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No. 01-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

PARTIES TO THE PROCEEDING

The petitioners in this case are all are or were officials with the Department of State or the National Security Council. The Department of State petitioners are Warren Christopher (former Secretary of State), Marilyn McAfee (former Ambassador to Guatemala), Alexander Watson (as Assistant Secretary for InterAmerican Affairs), Anne Patterson (as Deputy Assistant Secretary of InterAmerican Affairs), and Peg Willingham (as Guatemala Desk Officer). The National Security Council petitioners are Anthony Lake (former National Security Advisor and head of the National Security Council) and Richard E. Feinberg (as a staff member of the National Security Council). Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were three former directors of the Central Intelligence Agency (John M. Deutch, R. James Woolsey, and Robert M. Gates); fourteen officials and employees of the Central Intelligence Agency (David Cohen, John J. DeVine, Hugh E. Price, Thomas A. Twetten, John C. Gannon, Douglas J. MacEachin, John L. Helgerson, Terry R. Ward, Brian Latelle, Richard N. Cooper, Christine N. Williams, Joseph S. Nye, Fritz W. Esmarth, Dan Donahue, and Frederick A. Brugger), unnamed employees of the Department of State, National Security Council, and Central Intelligence Agency; the Department of State, National Security Council, and Central Intelligence Agency; and the United States of America (which was substituted as a party for purposes of the tort claims asserted originally against the named defendants). All of the petitioners are individuals or government entities, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Jennifer K. Harbury is the plaintiff in this case on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, and she was the appellant in the court below.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the D.C. Circuit in this proceeding.

The ruling below expands the constitutional right of access to the courts beyond all recognizable boundaries. Some lower courts have shown their willingness to take issues usually resolved through ordinary legal and judicial processes and transform them into constitutional violations. The court below now has gone considerably further by holding that government officials infringe this constitutional right when they affirmatively

misrepresent or conceal information, and it can be alleged that they did so in part to avoid or forestall a lawsuit. This all-encompassing conception of the Constitution has little in common with the Court's decisions.

Even if this supposed constitutional right does exist in this context, the ruling below deepens a circuit split over key elements of such a claim and would greatly broaden its applicability. First, the D.C. Circuit declined to adopt the approach embraced by the Sixth and Ninth Circuits, which have rejected access-to-courts claims absent any contention that the plaintiff tried to file a lawsuit and was actually hindered in that effort. Second, decisions from other circuits have required conduct that is much more egregious than mere allegations that government officials misrepresented or concealed information they were under no duty to provide. For these reasons, plenary review is warranted in this case.

The ruling below also sharply undermines the defense of qualified immunity that the Court has extended to shield government officials from personal liability. Those officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the alleged rights must be so clear that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Yet the ruling below holds that government officials violate clearly established law whenever they are alleged to have misrepresented or concealed information, since it can always be claimed later that their actions were intended to and did hinder the filing of some hypothetical lawsuit.

This holding will chill both the speech and the discretion of government officials. Moreover, as in this case, the profoundly adverse consequences of such a ruling for the conduct of our foreign policy and for the utility of American intelligence efforts are apparent. At the time these officials acted, no controlling decision and indeed no decision by *any* court *anywhere* in the

country had held that their actions were unlawful, and in fact the sparse rulings on qualified immunity supported their position. Thus, it was egregious error for the court of appeals to set aside the district court's ruling and negate the defense of qualified immunity.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit is reported as *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), and is reprinted in the Appendix to this petition ("Pet. App.") at 1a-29a. The D.C. Circuit's opinion reversed an order and opinion of the district court, which granted petitioners' motion to dismiss and upheld their defense of qualified immunity. The district court's unreported opinion is reprinted at Pet. App. 30a-57a. The court of appeals denied a timely petition for rehearing, which is reported as *Harbury v. Deutch*, 244 F.3d 956 (D.C. Cir. 2001), and reprinted at Pet. App. 61a-68a. The court of appeals also denied a suggestion of rehearing *en banc*, with two judges dissenting, which is reported as *Harbury v. Deutch*, 244 F.3d 960 (D.C. Cir. 2001), and reprinted at Pet. App. 69a-71a.

STATEMENT OF JURISDICTION

The court of appeals denied a timely petition for rehearing on April 6, 2001. Pet. App. 61a. The Court twice granted timely requests for extensions of the time within which to file a petition for certiorari, which was extended most recently to and including September 3, 2001. *See id.* at 72a-73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

The Privileges and Immunities Clause of the United States Constitution provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. CONST. art. IV, § 2.

STATEMENT OF THE CASE

A. The Allegations in the Complaint.

Respondent filed suit in 1996 against the Department of State, National Security Council (NSC), Central Intelligence Agency (CIA), and numerous officials and employees from each agency in both their individual and official capacities. The individuals named in her lawsuit include senior officials such as former Secretary of State Warren Christopher, former NSC head Anthony Lake, and former Ambassador to Guatemala Marilyn McAfee. Respondent asserts tort claims under the Federal Tort Claims Act (for which the United States of America has been substituted as a party), as well as constitutional claims for declaratory and injunctive relief, including a claim that she was denied her right of access to the courts under the First and Fifth Amendments. Respondent also sued the named individuals for damages on her constitutional claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and defendants moved to dismiss both as a matter of law and based on qualified immunity.

In her Second Amended Complaint, respondent makes the following factual allegations that the courts have assumed to be true at this juncture. She is an American citizen and is the widow of Efrain Bamaca-Velasquez, a Guatemalan citizen and

high-ranking commander of a Guatemalan rebel group, who vanished on March 12, 1992. *See* Pet. App. 2a, 30a. Although the Guatemalan army declared that Bamaca had committed suicide during an armed skirmish and that it had buried his body, this was not true. *See id.* at 3a. Instead, Bamaca had been captured and detained by members of the Guatemalan military, among whom were paid CIA informants. *See id.* The CIA is alleged to have been aware that Bamaca was being held by the Guatemalan army and that its paid agents would be involved in torturing him to obtain information. *See id.* at 5a.

Respondent also alleges that early in 1993, she learned from an escaped prisoner that her husband was alive and being tortured. She immediately contacted several State Department officials, told them what she had learned, and asked for information about her husband. *See* Pet. App. 3a. She states that the officials promised to look into the matter, but never provided her with any information. In August of 1993, she obtained permission to open Bamaca's grave and discovered that the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter but never provided respondent with any information. *See id.*

Bamaca was executed some time around September of 1993. *See* Pet. App. 3a. Over the next year, from October 1993 to October 1994, respondent met repeatedly with State Department officials, who assured her they were looking into the matter and told her the Guatemalan military had advised them that it did not have (and that it had never had) custody of Bamaca. *See id.* at 3a-4a. At that point, the CBS news program *60 Minutes* reported that the U.S. Embassy in Guatemala had an intelligence report stating that Bamaca had been captured alive. In response, the State Department publicly confirmed his capture, stating that he had been lightly wounded and was held prisoner for some time, and that it had no information confirming that he was still alive. *See id.* at 4a. Shortly thereafter, respondent met with petitioner Lake, head of the NSC, who told her the government had "scraped the bottom of the barrel" for information about her husband, that no further

information existed, and that he and other officials would keep looking and keep her informed. *See id.*

Respondent suspected that the State Department and NSC officials were withholding information and so filed a Freedom of Information request. Despite expedited proceedings, she did not receive any documents in the following months. *See* Pet. App. 4a. In March of 1995, she commenced a hunger strike in front of the White House. She also met with State Department and NSC officials, who told her that they believed Bamaca to be dead because so much time had passed with no evidence that he was still alive. A few days later, Congressman Bob Torricelli announced publicly that Bamaca had been killed years before on orders from one of the paid CIA informants. *See id.* at 4a-5a. Respondent alleges that petitioners intentionally misled her and concealed information in an effort to conceal their role and the government's role in Bamaca's death. *See id.*

In the Second Amended Complaint, respondent raised a variety of tort claims, including intentional infliction of emotional distress and wrongful death, as well as a claim for alleged violations of international law. *See* Pet. App. 7a. She also raised three constitutional claims: (1) defendants violated Bamaca's substantive due process rights under the Fifth Amendment by contributing to his torture; (2) defendants violated her constitutional right to familial association by participating in and concealing information about Bamaca's torture and murder; and (3) petitioners violated her constitutional right of access to the courts by misrepresenting and concealing information about her husband's fate. *See id.*

For purposes of this petition, respondent's principal *Bivens* claim rests on her allegations that petitioners (but not the other defendants) made intentionally misleading statements and omissions that prevented her from "effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight." Pet. App. 5a (quotation omitted).

B. The District Court Proceedings.

Defendants moved to dismiss respondents' claims in their entirety. After both sides briefed the legal issues, the district court (Kollar-Kotelly, J.) issued a thorough opinion that granted the motion to dismiss in relevant part and dismissed all of respondent's constitutional claims, leaving her tort claims to proceed under the Federal Tort Claims Act. *See* Pet. App. 30a-57a.

The court began by holding that defendants were not entitled to sovereign immunity on respondent's official capacity claims, since constitutional claims are a recognized exception to that defense. *See* Pet. App. 31a-32a. Nonetheless, it went on to apply *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to hold that respondent lacked standing to press those claims for declaratory and injunctive relief. *See id.* at 32a-34a.

The district court then addressed the three *Bivens* claims that were asserted against the defendants in their individual capacities. With respect to each claim, the court concluded that respondent's constitutional claims were insufficient as a matter of law and, in the alternative, that defendants were entitled to qualified immunity on those claims. *See* Pet. App. 35a-55a.

First, on the substantive due process claim that respondent asserted on behalf of the deceased Bamaca, the district court found controlling the Court's explicit rejection of "'the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.'" Pet. App. 39a (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)). It thus found as a matter of law that this claim was subject to dismissal. In addition, the court held that it is at best "'unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States,'" *id.* at 42a (quoting *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O'Connor, J., concurring)), and thus the defendants were entitled to qualified immunity on this claim.

Second, the district court rejected respondent's claim that petitioners had infringed her constitutional right of access to the

courts. The court recognized the validity of this right as protecting more than mere physical access to the courts, but agreed with those courts which have "required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-of-access claim." Pet. App. 45a (citing cases).[1] In this regard, it approvingly quoted the Sixth Circuit's observation that "[b]efore filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (quoted at Pet. App. 46a). Since respondent had never taken this necessary step, her "suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess," *id.*, and her claim was insufficient as a matter of law.

Because the district court recognized that any dismissal of this claim would be without prejudice to refile at a later time once respondent had attempted to prosecute her state-court claim, it proceeded to consider the qualified immunity issue. It held that petitioners were entitled to qualified immunity because, at the time they acted, the cases recognizing an access-to-courts claim had all involved more egregious allegations that defendants had "destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." Pet. App. 48a. By contrast, in this case respondent alleged only that petitioners had misled her by assuring her that "the government had no information about Bamaca and made allegedly disingenuous overtures to assist her." *Id.* Especially given the sensitive subject matter, which touched on delicate matters of relations with a foreign government, the court stated it could not hold that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had

[1] The court expressly noted a circuit conflict on the issue of whether to impose this requirement as an element of a right-of-access claim, but sided with what it described as "the better view" in favor of doing so. *See* Pet. App. 46a & n.2 (citing cases).

received about Bamaca." *Id.* Therefore they were entitled to qualified immunity on the access-to-courts claim.

Third, the district court held that respondent's familial association claim failed as a matter of law because the defendants' actions were not aimed directly at the familial relationship, and this limiting principle "best accords with Supreme Court precedent and the principles espoused in the First and Fifth Amendments." Pet. App. 50a. Even if the court had declined to apply this restriction, it determined that the law was not clearly established that any such constitutional claim can be extended beyond the parent-child relationship, and thus again qualified immunity was appropriate. *See id.* at 52a.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of respondent's *Bivens* claims as final, *see* Pet. App. 59a, and thereafter respondent appealed.

C. The Decision by the Court of Appeals.

The court of appeals (*Tatel*, Edwards, Ginsburg) affirmed the district court in almost all respects, but reversed and reinstated respondent's claimed violation of her constitutional right of access to the courts. *See* Pet. App. 1a-29a.

On respondent's access-to-courts claim, the court began by stating that the Constitution does confer such a right, which "not only protects the ability to get into court, . . . but also ensures that such access be 'adequate, effective, and meaningful.'" Pet. App. 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). It then discussed decisions from other circuits which "have found that government cover-ups can infringe the right of access to the courts," Pet. App. 21a, and noted respondent's allegations that petitioners had misled her and concealed information that deprived her "'of her right . . . to adequate, effective, and meaningful access to the courts,'" *id.* at 22a (quoting complaint). Petitioners argued that these other decisions were inapposite, because all involved instances "where police officers charged with investigating a crime destroy, conceal, or manufacture evidence in violation of statutory duties." *Id.* at 22a-23a. Yet the court rejected this view,

finding sufficient respondent's allegations that they intentionally deceived her and did so in part to prevent her from bringing suit. The court held that "regardless of whether State and NSC officials had an affirmative duty to provide information to [her] in the first place, the complaint states a clear case of denial of access to courts." *Id.* at 23a.

The court of appeals also rejected the principal basis for the district court's contrary decision. It recognized that its decision would appear inconsistent with decisions by the Sixth and Ninth Circuits, which had rejected access-to-courts claims where plaintiffs had not yet completed prosecuting their tort claims and thus could not yet establish that their state court remedies had been rendered ineffective. *See* Pet. App. 23a-24a (discussing *Swekel*, 119 F.3d at 1264, and *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998)). Yet here respondent claimed that had she known all the true facts, she might have been able to take some action to save her husband's life, such as "seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media." Pet. App. 24a (quoting complaint). At argument, respondent had elaborated that she might have sought "an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress" or filed her FOIA requests sooner. *Id.* Because respondent had thus identified some possibility of irreparable harm from petitioners' conduct, the court of appeals held that the "exhaustion" requirement imposed by the Sixth and Ninth Circuits was not applicable to her claims. *See id.* at 25a. And even though respondent could have decided to file a lawsuit or her FOIA requests at any time, the court found that because of petitioners' alleged concealments she may not have known enough to do so. *See id.* at 24a-26a.

With respect to qualified immunity, the court of appeals rejected the district court's conclusion that the unlawfulness of petitioners' conduct would not have been apparent from prior cases involving "allegations of 'nefarious conduct,' such as manufacturing false evidence or destroying or refusing to collect evidence," even though they were under no statutory obligation

to investigate the matter. Pet. App. 26a. Instead, it held that petitioners' alleged conduct was clearly unconstitutional insofar as they "affirmatively misled" respondent and one of their purposes in doing so was "preventing her from filing a lawsuit." *Id.* at 27a. The court did not specify the decisions prior to 1993 that had clearly established the unlawfulness of such conduct, and did not identify any *controlling* decisions on this point, but purported to "[join] our sister circuits" by simply proclaiming that "we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit." *Id.* at 28a.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied, *see* Pet. App. at 61a-71a, with Judges Henderson and Sentelle dissenting from denial of rehearing *en banc*. Judge Henderson's dissent agreed with the district court that respondent "suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor." *Id.* at 70a. Because respondent had not identified "any effective relief" that had been foreclosed by petitioners' alleged misrepresentations and nondisclosures, she could not establish that their conduct was "a substantial cause of [her] failure to obtain judicial relief." *Id.* (quotation omitted). Moreover, the extant precedents were so sparse and distant from the allegations in this case that petitioners would not have been "on notice that such very different conduct might violate [respondent's] right of access to the courts." *Id.* at 71a.

The panel commented further in response to the dissent. First, the panel expressly noted that its holding did in fact transcend "the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." Pet. App. 62a. Nonetheless, it contended that this expansion was justified because petitioners' conduct "completely foreclosed" her ability to obtain a specific form of relief in a hypothetical lawsuit – injunctive relief based on a tort claim for intentional infliction of emotional distress – that might have

saved her husband's life. *Id.* It also suggested that the opinion was narrow in scope, being limited to situations where "defendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting government officials from suit," including efforts to protect either themselves or other officials. *Id.* Finally, with respect to qualified immunity, the panel rejected the notion that cases from other circuits involving the fabrication of evidence were not specific or pertinent enough to put petitioners on notice that their alleged conduct here would violate "clearly established" constitutional rights and give rise to personal liability for damages (though many of the cases cited postdated the conduct at issue here). *See id.* at 66a-67a.

This petition for *certiorari* followed. Petitioners are the State Department and NSC officials who were sued in their individual capacity, as they were the only defendants named by respondent on her access-to-courts claim.

REASONS FOR GRANTING THE WRIT

The courts below recognized and applied the methodology that this Court has now specifically required in qualified immunity cases, under which the courts "'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Pet. App. 8a-9a (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). *See also Saucier v. Katz*, 121 S. Ct. 2151, 2155-56 (2001); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, the court below made two rulings in this case that are independently worthy of review here: *first*, a party states a valid claim for a violation of the constitutional right of access to the courts by alleging that government officials made affirmatively misleading statements or concealed information where one of their purposes was to protect themselves from suit; *second*, this right was "clearly established" in 1993 – based on lower court decisions that were neither clear nor controlling – such that government officials who allegedly engaged in such conduct are not entitled to qualified immunity.

On the first issue, addressing the merits of respondent's claim that her constitutional right of access to the courts was violated in this case, some of the lower courts have departed dramatically from the Court's precedents to fashion a novel right that would constitutionalize issues which are already adequately addressed by the ordinary legal and judicial processes of this country. In this case, in particular, the court below held explicitly that government officials violate such a right when they affirmatively mislead or conceal information from a private citizen and one of their purposes was to protect themselves from suit, regardless of what their other purposes and objectives may be. *See* Pet. App. 28a; *id.* at 23a ("*One of* their express objectives, [respondent] alleges, was to prevent her from suing them.") (emphasis added). This far-reaching version of the Constitution cannot be squared with the Court's precedents in this area, *see, e.g., Lewis v. Fletcher*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977), and it should be repudiated in this case.

Moreover, the ruling below parts company with other circuits in two key respects that dramatically expand the application of this right of access to courts. First, as the court of appeals acknowledged, at least two other circuits have declined to uphold access-to-courts claims absent any contention that the plaintiff tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 23a-24a. This requirement erects a substantial bar to the easy acceptance of such claims. Nonetheless, the court below dispensed with this limitation in any circumstance where the plaintiff can allege some potential source of irreparable harm entitling them to a particular form of relief. Second, other circuits that have upheld such claims have required much more than allegations that government officials misled or concealed information they were under no legal duty to provide. Indeed, as the district court noted, in "each of [those other] cases, . . . the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence" contrary to an express legal duty to do so. *Id.* at 47a. By relaxing these criteria and allowing constitutional claims based on mere

"disinformation," the court below again expanded the scope of the alleged right of access in new and troublesome ways.

On the second issue, this case raises a question that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or from the relevant Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? The very limited guidance on that issue from this Court has enabled the courts of appeals to adopt very different approaches. Even more problematic, the lower courts here rejected the defense of qualified immunity, despite the fact that other courts have rejected the alleged constitutional violation or have upheld the defense of qualified immunity in similar circumstances. Petitioners suggest that the Court's precedents squarely preclude this result and thus mandate summary reversal on the qualified immunity issue in this case. As the Court has said time and again, government officials do not have to prophesy future trends in constitutional jurisprudence on pain of personal liability for money damages. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 617-18 (1999).

If the ruling below is allowed to stand, then government officials will be subjected to personal liability where they mislead or conceal information and their motivation can be alleged *in part* to be avoiding or forestalling a lawsuit. The consequences of this position would be profound. To begin with, such constitutional claims may turn out to be viable in a great many instances where the plaintiff can claim that he or she would have brought some form of action for injunctive relief alleging irreparable harm. Moreover, the desire to avoid lawsuits is easy to allege, even where public officials obviously have other motivations as well, including reasons not to be completely forthright in discussing sensitive facts or issues, such as the need to preserve the secrecy of government deliberations or even of covert operations. Further, since this decision was issued by the controlling court of appeals in the nation's capital, the adverse

effects for the conduct of foreign policy and the pursuit of American intelligence efforts would be significant and undeniable.

I. THE RULING BELOW THAT GOVERNMENT OFFICIALS VIOLATE A PRIVATE CITIZEN'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS BY PROVIDING INTENTIONALLY MISLEADING INFORMATION IS OUT OF STEP WITH THE COURT'S PRECEDENTS.

In upholding respondent's right-of-access claim in this case, the court of appeals joined other lower courts that have gone well beyond the Court's precedents in this area. It did so by adapting and expanding prior decisions in which this Court had invoked the Due Process Clause to disapprove institutional mechanisms that systematically barred access to the courts or had imposed arbitrary restrictions on judicial access for prisoners held in government custody. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977) (individuals cannot be denied access to courts to dissolve their marriage based on inability to pay required costs); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (prisoner's right of access to the courts requires access to pertinent legal materials to make it "adequate, effective, and meaningful"); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating regulation that unreasonably limited prisoner's access to other prisoners who can provide legal advice).[2] The ruling below, however, takes this right of access in new directions by constitutionalizing issues that are already adequately addressed by the ordinary legal and judicial processes of this country.

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[2] Lower courts that have discussed the right of access in the context of private civil proceedings have also stated that it may derive from the Privileges and Immunities Clause, *see, e.g., Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907), or from the right to petition conferred by the First Amendment, *see, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See generally Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983).

The court below expressly held that government officials violate this right of access to the courts when they hinder a private citizen from bringing a lawsuit by misrepresenting or concealing information, and at least *one* of their purposes was to protect themselves from suit, regardless of what other purposes they may have had. *See* Pet. App. 28a, 23a. But this expansive reading of the Constitution is out of step with the Court's more recent precedents in this area, which have cut back the scope of the right. *See, e.g., Lewis v. Fletcher*, 518 U.S. 343 (1996) (overturning broad injunctive relief premised on alleged *Bounds* violations); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989) (stating more permissive test for evaluating restrictions on prisoners). Indeed, the Fifth Circuit has expressed skepticism about applying precedents like *Bounds* in this very different setting:

> In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to get legal advice, they need only travel to a lawyer's office or the nearest law library, or pick up the telephone.

Crowder, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

Indeed, in *Lewis*, which partially curbed the reach of *Bounds*, the Court expressly repudiated any "suggest[ion] that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court." 518 U.S. at 354 (emphasis in original). As the Court stated: "These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them." *Id.* Under *Lewis*, therefore, the Constitution does not require government officials to take affirmative steps to enable prisoners held in their custody to "discover grievances" and "to litigate effectively," even though their confinement substantially hampers their litigating capacity as "one of the incidental (and perfectly

constitutional) consequences of conviction and incarceration." *Id.* Clearly, then, public officials are under no corresponding duty to take such steps on behalf of private citizens who enjoy continual and unfettered access to the federal and state court systems. *Id.* at 355; *see also id.* at 365 (Thomas, J., concurring) (expressing doubts about the validity of *Bounds* and "of a loosely defined 'right of access to the courts'").

The broader version of the constitutional cause of action that emerges from the ruling below in this case also appears to be directly inconsistent with the thrust of the Court's procedural due process cases. Reversing the district court's dismissal of the access-to-courts claim, the court of appeals held that respondent was not required to show that she had ever tried to file a lawsuit and had actually been hindered in that effort. *See* Pet. App. 23a-26a; *see also infra* Section II (discussing circuit conflict on this point). Abandoning this important "exhaustion" requirement has the potential to unleash massive amounts of constitutional litigation that would displace great swaths of state tort law. The Court's precedents take a dim view of this prospect.

In *Paratt v. Taylor*, 451 U.S. 527 (1981), for example, the Court held that a prisoner did not state a valid due process claim where adequate remedies were available to seek redress in the state courts, though he had not made use of them. The Court noted that this "procedure was in existence at the time of the loss here in question," and though "the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court], that does not mean that the state remedies are not adequate to satisfy the requirements of due process," at least where the alleged deprivation did not occur pursuant to any established procedure. *Id.* at 543-44. The Court expressed special concern that any other result "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment." *Id. See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that *Paratt* is applicable to intentional deprivations by government officials); *Lujan v. G&G Fire Sprinklers*, 121 S. Ct. 1446, 1450 (2000) (finding no due

process violation where state withholds payment on contract because claim for payment "can be fully protected by an ordinary breach-of-contract suit").

Some of the lower courts have recognized that these concerns are just as applicable to right-of-access claims, and many distinct remedies have been cited as adequate avenues for redressing these kinds of claims. *See, e.g., Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (available state tort remedies can be bolstered by doctrine of equitable tolling and separate cause of action for spoliation of evidence); *id.* at 1265 (Merritt, J., concurring) ("We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994) (plaintiffs "could, of course, have sought relief in state court for the challenged behavior using a variety of state law [procedural] remedies"); *Ryland*, 708 F.2d at 973 n.7 (remedies and penalties for obstruction of justice). And in this case, in fact, respondent was never actually barred from the courts; she could have filed one or several lawsuits at any time, or she could have pursued her FOIA action sooner.

In sum, the Court should grant *certiorari* in this case to review the entire direction of lower court decisions in this area, in order to vindicate its longstanding view that the Due Process Clause was not intended to create "a font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT.

To the extent that a constitutional right of access to the courts is even determined to be applicable in this context, substantial disagreements remain about the necessary elements for validly stating any such claim. And obviously whether the

requisite elements are understood strictly or leniently makes a considerable difference to how often such claims would arise and how much non-constitutional law they would subsume. The ruling below justifies plenary review, among other reasons, because it defines the contours of this right far more aggressively than any other decision issued to date.

As the district court noted, the circuit courts of appeals are split on whether this right of access can be violated absent any claim that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 46a & n.2 (citing cases). The court of appeals itself acknowledged that at least two other circuits have declined to uphold access-to-courts claims unless the plaintiff tried to file a lawsuit and was actually hindered in that effort. *See id.* at 23a-24a. By dispensing with this requirement, the court below dramatically expanded the application of the right of access in the context of civil proceedings.

The Sixth Circuit has held that even where the plaintiff alleges "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," such actions would not "amount[] to a constitutional violation" unless she can "show absolute denial from state court." *Swekel*, 119 F.3d at 1264. As the explained its sensible view of the need for such an "exhaustion" requirement:

> [Plaintiff,] however, never presented evidence that the state court could not adequately address these problems. In fact, none of the evidence before this court establishes that Swekel even attempted to go to the state court in the first instance. Before filing an "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective" and "meaningful"?

Id. The court therefore affirmed dismissal of the access-to-courts claim on the basis that a plaintiff "cannot merely guess that a state court remedy will be ineffective," but must show that

"the defendant's actions actually rendered any state court remedy ineffective." *Id.*

Likewise, in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), the Ninth Circuit took this requirement even further by dismissing an access-to-court claim where the plaintiffs *had* brought a wrongful death claim in the state courts, but then filed suit in federal court claiming that their constitutional rights had been violated by law enforcement officers who tried to cover up their involvement in a shooting. The court held that to present a valid claim, plaintiffs must be able to show that "the defendants' cover-up violated their right of access to the courts by rendering '*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). The court concluded that because their "wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred." 143 F.3d at 1223.

After acknowledging the tension between its own approach and these decisions, *see* Pet. App. 23a-24a, the court below purported to distinguish them, but its efforts to do so are unpersuasive. The gist of its position is that because respondent alleges that she suffered irreparable harm by not bringing her claim for some form of emergency injunctive relief to save Bamaca's life before it was too late, she can plausibly claim that petitioners' alleged misrepresentations and concealments completely foreclosed her from pursuing this relief. *See* Pet. App. 24a-26a, 63a-64a. This approach, however, conflates two distinct points. By holding that respondent's constitutional rights were infringed because she was hindered in pursuing a specific remedy, rather than that she was prevented from taking her claims to court, the court below fashioned a much broader constitutional entitlement: no longer is a plaintiff entitled only to exercise a "facilitative" right to *access* the courts, but he or she can now lay claim to secure a particular and most desirable outcome. As the Fifth Circuit put the matter in rejecting a claimed right of access resting on such broad allegations: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural

posture *or the right to a particular form of relief.*" *Crowder*, 884 F.2d at 813-14 (emphasis added).

Indeed, the court below sought to rest its ruling upon Bamaca's intervening demise, as a unique circumstance that would militate in favor of recognizing a claimed right of access only in a few such cases. *See* Pet. App. 24a-26a, 63a-64a. But this supposed rampart lacks solidity. There is, of course, no doubt that death constitutes a substantial and irreparable harm that cannot be undone by any later proceedings. Yet in every case where the plaintiffs could plausibly claim some entitlement to injunctive relief – which necessarily includes allegations of irreparable harm – they would be able to surmount this hurdle and press their constitutional access-to-courts claim. And the prospect for recognizing such constitutional claims would be greatly enhanced, given that plaintiffs' allegations would occur against a backdrop not of any concrete litigation, but of utterly hypothetical lawsuits – such as respondent's claim that in a state tort suit for intentional infliction of emotional distress she would have been able to obtain an emergency injunction to save Bamaca's life, where it is alleged that he was being held and tortured by a foreign government.

Indeed, there is no question here that insistence on this key "exhaustion" element is determinative of the proper outcome in this case. Adopting the approach endorsed by the Sixth and Ninth Circuits, which it explicitly determined "represents the better view" on this issue, Pet. App. 46a n.2, the district court held that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so, *see id.* at 45a-46a. Rejecting that approach, the court of appeals reversed and reinstated her claim. *See id.* at 23a-26a. Therefore, this case directly implicates the circuit split on this issue and affords an appropriate vehicle for resolving it.

The circuit courts of appeals also are split on how egregious a government official's conduct must be to trigger a valid access-to-courts claim. Other circuits that have upheld such claims have required much more than allegations that

government officials misled or concealed information they were under no legal duty to provide. Indeed, as the district court noted, in "each of [those] cases, . . . the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence" contrary to an express legal duty to do so. Pet. App. 47a. The court of appeals again found it unnecessary to require any such strict showing in upholding respondent's claim. *See id.* at 22a-23a. But by deciding to allow constitutional claims based on mere "disinformation," the court below again expanded the scope of the alleged right of access in directions that raise further concerns.

In particular, the court below held that whenever government officials are alleged to have misrepresented or concealed information and it is alleged that at least *one* "of their express objectives . . . was to prevent [the plaintiff] from suing them," Pet. App. 23a, they can be forced to defend against constitutional right-of-access claims. And this is true regardless of what other objectives their conduct may have served, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations. Obviously this is a much more lenient standard than the kind of egregious conduct required by other courts, where covering up nefarious activities (either by oneself or with others) is the dominant or even the sole motivation for the defendant's actions. *See, e.g.*, Pet. App. 47a-48a; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (denying right-of-access claim where actions of defendants, though "inexcusable," were not "egregious" enough to justify finding a constitutional violation); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264-65 (7th Cir. 1984) (upholding access-to-courts claim, but limiting it to "particularly egregious set of facts" before the court, where police officers killed a man then planted evidence to cover up their wrongful conduct).

The ruling below thus takes a very different approach than the decisions of other circuit courts, and the indubitable result is a direct and irreconcilable conflict that will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The D.C. Circuit has

now upheld respondent's constitutional claim that the district court had dismissed in accordance with decisions reached by those other circuit courts. Public officials and potential plaintiffs will continue to have their legal claims resolved inconsistently in different jurisdictions – under quite different renditions of their constitutional rights and duties – unless this Court intervenes.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE.

The Court has settled that public officials who perform discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The ruling below departs radically from this standard. In this case, there was no binding authority from this Court or from the court below which offered even a hint that petitioners' conduct would be held to violate respondent's constitutional right of access to the courts, let alone that any such right was "clearly established" as of 1993 and 1994. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous," *Crowder*, 884 F.2d at 811, and in the years since the range of disagreement has increased rather than narrowed. These facts are dispositive in favor of qualified immunity here.

In this posture, a recurring question in addressing the issue of qualified immunity is what weight (if any) should be given to the (non-binding) decisions of other courts on the same issue? In *Harlow*, the Court expressly declined to decide when and in what circumstances the central question of whether the law was "clearly established" can be resolved by lower court case law. *See* 457 U.S. at 818 n.32. More recently, the Court encouraged a broader examination of the law from other jurisdictions, stating that a "court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents." *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (quotation omitted; brackets in original).

The Court has indicated that decisions emanating from other jurisdictions are most relevant where they tend to show that the law was *not* uniform or settled at the time. For example, in *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court considered contrary decisions from other jurisdictions in concluding that the law was not "clearly established" against the public officials sued in that case, *see id.* at 563-65 & nn.8-10, stating pointedly that they "cannot be expected to predict the future course of constitutional law," *id.* at 562. And in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court took note of divisions on the merits among the lower courts and observed that if "judges thus disagree on a constitutional question, it is unfair to submit [government officials] to money damages for picking the losing side of the controversy." *Id.* at 618.

In the wake of this fairly limited guidance,[3] some courts have held that the absence of clear authority from a controlling tribunal is itself decisive in favor of qualified immunity. *See, e.g.*, *Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 522 U.S. 966 (1997). Others, such as the court below in this case, have treated the generality of this

[3] Commentators have noted the lack of definitive guidance from the Court on this issue. *See, e.g.*, Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 627 (1993) ("lower courts have had to struggle with the 'where to look' problem when resolving qualified immunity disputes" and "have not been uniform in their approaches to the issue"); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1751 (1991) (ten years after *Harlow*, the question of where to look for clearly established law "remains unresolved"); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605 n.41 (1989) (the Supreme Court has not answered "whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant").

Court's guidance as license to rely on more tangential analogies to generalized precedents, and to use them even to *defeat* a claim of qualified immunity. *See* Pet. App. 26a-28a, 66a-67a. But particularly where, as here, no controlling authority clearly establishes the law one way or the other, and the tenor of other decisions confirms that the law was at least unsettled at the time (or perhaps even tilted in favor of the lawfulness of such conduct), the defense of qualified immunity must be upheld. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) (the "decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted").

Here the district court analyzed the issue in these terms, but the court of appeals failed to do so. *Compare* Pet. App. 47a-49a *with id.* at 26a-28a, 66a-67a. In particular, the court of appeals committed two major errors that affected its decision.

First, the court of appeals failed to come to grips with lower court precedents from other jurisdictions that had rejected access-to-courts claims in similar circumstances. As noted above, *see supra* Section II, the Sixth and Ninth Circuits have held that a plaintiff cannot state a valid claim for denial of access to the courts without first trying to file a lawsuit and being actually hindered in that effort. *See Swekel*, 119 F.3d at 1264; *Delews*, 143 F.3d at 1223. In this case, however, the court of appeals declined to impose any such requirement. *See* Pet. App. 23a-24a. In light of the disagreement among the lower courts on the merits of the underlying constitutional issues (which the district court noted, *see id.* at 46a & n.2), as well as the disagreement on the merits among the judges of the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*), petitioners' defense of qualified immunity should have been upheld in this case. *See, e.g.*, *Wilson*, 526 U.S. at 618.

Second, the court of appeals relied heavily on decisions that postdated the events in question for aid in trying to show that the law was "clearly established" in favor of respondent's access-to-courts claim. *See* Pet. App. 66a-67a (citing, *inter alia*, cases from 1995, 1997, and 1998). That is wholly

improper. Public officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow*, 457 U.S. at 818; *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The importance of close adherence to these principles is manifest in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original). In fact, at the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had definitively ruled that their actions were unlawful. Against this backdrop, the court of appeals simply could not legitimately invalidate their defense of qualified immunity.

Summary reversal is therefore warranted on this claim. Such a result will serve judicial administration by reasserting the Court's authority to superintend the lower courts and ensure strict fidelity to the important doctrine of qualified immunity. Indeed, the Court has used the mechanism of summary reversal to overturn other flawed lower court rulings on qualified immunity, stressing that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341).

Furthermore, the court of appeals also failed to address conflicting decisions that had upheld claims of qualified immunity in similar circumstances over the same general period. In *Foster*, for example, the plaintiffs brought suit against city officials who were alleged to have concealed and suppressed evidence to hinder plaintiffs' action for wrongful death against the city. The Fifth Circuit concluded that whether or not plaintiffs' subsequent lawsuit stated a proper constitutional claim for denial of access to the courts, they were entitled to assert qualified immunity because the contours of any such right in the late 1980s "could best be described as 'nebulous,'" even in light of several decisions that had already been issued by that

court. 28 F.3d at 430 (quoting *Crowder*, 884 F.2d at 811); *see also Ryland*, 708 F.2d at 975-76 (recognizing defendants may be entitled to qualified immunity on access-to-courts claim).

Nothing significant is alleged to have occurred between the late 1980s and the early 1990s to cause the law suddenly to have become "clearly established" in this continually evolving area. Indeed, the *Foster* decision upholding qualified immunity was issued late in 1994. Accordingly, if the Court declines to grant summary reversal on the qualified immunity issue, the square conflict between *Foster* and the ruling below warrants plenary review.

The core problem here is that the regime of qualified immunity laid down by the court below is untenably strict. Public officials located in the District of Columbia can now be held personally liable for making the wrong guesses in gray areas of the law, and not simply for transgressing bright lines. Yet qualified immunity has been designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. "The reasonable actor must have known that the conduct violated a clearly-established right; not that, in some sense, he was doing something wrong." *Foster*, 28 F.3d at 430. The court of appeals here failed to heed this Court's repeated warning that public officials are not "expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also Wilson*, 526 U.S. at 617-18; *Mitchell*, 472 U.S. at 535. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce that ostensibly clear message to the lower courts once again.

IV. IF ALLOWED TO STAND, THE RULING BELOW WOULD HAVE PROFOUNDLY ADVERSE CONSEQUENCES FOR THE CONDUCT OF OUR FOREIGN POLICY AND THE UTILITY OF AMERICAN INTELLIGENCE EFFORTS.

The practical consequences of the ruling below in this case are alarming. Whenever government officials are alleged to have misrepresented or concealed information they are under no

duty to provide, and their alleged motivation is at least in part to avoid or forestall a lawsuit, a constitutional violation can be stated as long as the plaintiff manages to set out a hypothetical claim for a particular form of relief that has been prejudiced somehow. This sweeping formulation of the constitutional right of access to the courts is problematic in at least four respects.

First, in any case where the plaintiff can claim that he or she would have brought some form of action for injunctive relief, which by definition involves immediate allegations of irreparable harm, the misstatement or concealment of pertinent information by government officials would give rise to a viable constitutional claim. Such cases could be frequent, especially since potential plaintiffs often believe that those whom they contemplate suing have not been candid with them.

Second, the approach adopted by the court below sweeps into its orbit any situation where the official may be acting with mixed motivations or for multiple purposes. The alleged "disinformation" allegedly offered by officials to discourage a lawsuit might also, or primarily, have been provided to achieve other objectives, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations. Yet in many instances the plaintiff will be able plausibly to allege that "*one* of their express objectives" was to prevent a lawsuit. Pet. App. 23a (emphasis added).

Third, all of these concerns are exacerbated by the qualified immunity holding below, which adds to these undesirable effects the cloud of potential personal liability in damages. That unappetizing prospect would necessarily have to be weighed by government officials whenever they respond to requests for information or engage in public discussions on any serious topics of public or private concern.

Fourth, the ruling under review in this case was issued by the federal court of appeals in the nation's capital, and was upheld, over the protests of two dissenting judges, by the entire court voting *en banc*. Aside from this Court, that tribunal is the controlling authority for the venue encompassing the most senior federal officials who conduct foreign affairs as well as key

personnel involved in American intelligence efforts. The chilling effect of this decision on their future conduct in these delicate areas can hardly be overestimated.

In fact, this case is illustrative, for petitioners are alleged to have misrepresented and concealed information in part to avoid or forestall a lawsuit, where undoubtedly if they did so at all, they did so principally or even entirely to protect the confidentiality of covert foreign intelligence operations and sources. There may be many arguable grounds for evaluating the appropriate means and ends of such operations, but there is little reason to believe that airing those details in constitutional lawsuits brought by individual citizens in the federal courts is the proper forum for pursuing such efforts. All of these practical reasons militate in favor of granting review here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

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APPENDIX

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APPENDIX A

Jennifer K. HARBURY, Appellant,
v.
John M. DEUTCH, et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 8, 2000.
Decided Dec. 12, 2000.
As Amended Dec. 12, 2000.

Appeal from the United States District Court for the District of Columbia (No. 96cv00438).

Jodie L. Kelley argued the cause for appellant. With her on the briefs were Paul Hoffman, Beth Stephens and Jennifer M. Green. Maureen F. Del Duca entered an appearance.

R. Craig Lawrence, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief was Wilma A. Lewis, U.S. Attorney.

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

Jennifer Harbury claims that for about one and a half years in the early 1990s, Central Intelligence Agency officials participated in the torture and murder of her husband, a Guatemalan citizen. She also claims that while he was being

tortured and for more than a year and a half after his death, State Department and National Security Council officials systematically concealed information from her and misled her about her husband's fate. Seeking, among other things, damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), she filed suit in federal court, claiming deprivation of her husband's Fifth Amendment due process rights, violation of her right to familial association, and interference with her right of "access to courts." The district court dismissed these actions, finding that Harbury had failed to allege the deprivation of any actual constitutional rights, and that even if she had, defendants were entitled to qualified immunity. We agree with the district court as to Harbury's Fifth Amendment and familial association claims. But because we find that she has stated a valid claim for deprivation of her right of access to courts, and because the NSC and State Department officials are not entitled to qualified immunity on this claim, we reverse and remand for further proceedings.

I

Since this appeal comes here on a motion to dismiss, we accept the facts as alleged in the complaint. *See Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995). Emphasizing that defendants have not yet answered Harbury's charges and that her claims have been subject to neither discovery nor cross-examination, we set out the facts as she pleads them, borrowing liberally from her complaint.

In 1991, Harbury, an American citizen, married Efrain Bamaca-Velasquez, a Guatemalan citizen and high-ranking member of the Guatemalan National Revolutionary Union, a Guatemalan rebel organization. Several months after their Texas wedding, Bamaca returned to Guatemala where, on or around March 12, 1992, he disappeared. The Guatemalan army

reported that during a skirmish with its troops, Bamaca committed suicide and was buried nearby. This was false. In fact, Bamaca had been captured and secretly detained by members of the Guatemalan military, including, Harbury alleges, CIA "assets" – members of Guatemalan Security Forces or Intelligence Services paid by the CIA to obtain information about the Guatemalan resistance.

According to the complaint, over the next twelve to eighteen months, Bamaca's captors psychologically abused and physically tortured him. They chained and bound him naked to a bed, beat and threatened him, and encased him in a fullbody cast to prevent escape. Eventually, probably some time around September of 1993, they executed him.

About a year after Bamaca disappeared, in early 1993, Harbury learned from a prisoner who had escaped from a Guatemalan interrogation camp that her husband was alive and being tortured. Harbury immediately contacted several State Department officials, reported what she had learned, and asked for information about her husband's status. Although officials to whom she spoke promised to look into the matter, they never provided her with any information.

In August 1993, Harbury obtained permission to open Bamaca's grave. Discovering that the body there was not his, she immediately informed Marilyn McAfee, the U.S. Ambassador to Guatemala. Although the Ambassador told Harbury that she would investigate the matter and report her findings, she too never provided Harbury with any information.

Over the next year, from October 1993 to October 1994, Harbury met repeatedly with State Department officials. Saying they were concerned about Bamaca's situation, these officials reassured her they were seriously looking into the matter and told her the Guatemalan Military had informed them

that it did not have (and had never had) custody of Bamaca.

In October of 1994, the CBS news program 60 Minutes reported that the U.S. Embassy in Guatemala had an intelligence report confirming that Bamaca had been captured alive. In response, the State Department publicly confirmed Bamaca's capture, stating that he had been lightly but not seriously wounded and held prisoner for some time. The State Department also reported that it had no information confirming that Bamaca was still alive.

In the wake of the 60 Minutes report and the State Department's public statements, Harbury met with National Security Advisor Anthony Lake, who told her that the government had "scraped the bottom of the barrel" for information about her husband and that no further information existed. Complaint ¶ 83. He promised that the government would not only continue searching for information, but also keep Harbury informed. Other State Department and NSC officials likewise told her that they had no concrete information about Bamaca's condition, but that they were continuing to assume that he was still alive. Suspecting that State and NSC officials were withholding information, Harbury filed a Freedom of Information Act request. Despite expedited processing, she received no documents in the following months.

Finally, because of the "failure of the [State Department and NSC] defendants to inform her of her husband's fate," Harbury announced that she would begin a hunger strike in front of the White House on March 12, 1995, the third anniversary of her husband's disappearance. Complaint ¶ 87. State Department and NSC officials then met with her again, telling her this time that they believed Bamaca was dead because so many years had passed without evidence that he was alive. Unconvinced, Harbury began her hunger strike. Twelve days into the strike, Congressman Robert Torricelli announced

publicly that years earlier, Bamaca had been killed at the order of a paid CIA asset.

On her own behalf and as administratrix of Bamaca's estate, Harbury brought suit in the U.S. District Court here against various named and unnamed officials of the CIA, the State Department, and the NSC. She based her claims on two broad factual allegations. First, she alleged that CIA officials at all levels "knowingly engaged in, directed, collaborated and conspired in, and otherwise contributed to [her husband's] secret imprisonment, torture and extrajudicial murder." Complaint ¶ 49. Many of the Guatemalan military officers who tortured and killed Bamaca, she alleged, were paid CIA agents. Two had been trained in torture and interrogation techniques at the School of the Americas, a U.S. Army facility located in Georgia. According to Harbury, CIA officials who did not participate directly in Bamaca's torture not only paid Agency assets for information about Bamaca's rebel organization, knowing that the information had been extracted through torture, but also requested further intelligence, knowing it too would be obtained in the same manner. And as a general matter, Harbury alleged that CIA officials knew of other gross human rights violations in Guatemalan interrogation centers – including beatings with cement blocks, burials of prisoners alive, and electrical shocks to the testicles and legs – and that CIA officials up the chain of command, from the operations and intelligence divisions to the Director himself, expressly authorized their assets to use torture to obtain information from Guatemalan rebel leaders.

Second, Harbury alleged that while Bamaca was still alive, State Department and NSC officials, including Ambassador McAfee and NSA Lake, made "fraudulent statements and intentional omissions" that prevented her from "effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her

husband's true plight." Complaint ¶ 98. According to the complaint, when Harbury first contacted State Department officials to follow up on what she had learned from the escaped prisoner, they actually knew that her husband was alive and being tortured. They knew this, she alleged, because a week after Bamaca's capture, the CIA informed both State Department and White House officials that Guatemalan military forces would "probably fabricate his combat death in order to maximize their ability to extract information from [him]." *Id.* at ¶¶ 35, 56-57. Yet State Department officials, including Ambassador McAfee, revealed none of this information to Harbury. Instead, they repeatedly reassured her that although they were investigating Bamaca's fate, they had discovered nothing. According to Harbury, internal memoranda distributed and received by both State Department and NSC officials demonstrate their "intent to keep the involvement of the U.S. Government in the detention, torture, and execution of Mr. Bamaca out of the public eye." *Id.* at ¶ 69. Those officials, she alleged, "intentionally misled [Harbury], through their deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want to threaten their ability to obtain information from Mr. Bamaca," and because they feared that if they disclosed information to Harbury or anyone else, "they could then be subject to public embarrassment, censure, and/or legal liability." *Id.* at ¶¶ 67-69.

After Bamaca's death, the pattern of deception and nondisclosure allegedly continued. Although the Defense Intelligence Agency reported in September 1993 to the State Department, the White House, and the U.S. Embassy in Guatemala that Bamaca had been killed, all officials Harbury met with during the following months, including NSA Lake, continued to lead her to believe not only that her husband was alive, but also that they were doing all they could to learn more about him. "[A]t no time," she alleged, did these officials

inform her that "they were unwilling to investigate her case or to give her information about her husband's situation. Instead, a decision was made to neither share the information with her, nor inform her of the existence of such information." *Id.* at ¶ 77.

Based on these factual allegations, Harbury pleaded 28 specific causes of action, including (1) claims against defendants in their official capacities seeking a declaratory judgment that their conduct was unconstitutional, as well as an injunction preventing the CIA from extracting information through torture and preventing the State Department and NSC from concealing information about CIA torture victims; (2) *Bivens* actions against defendants in their individual capacities seeking damages for their alleged constitutional violations; (3) common law tort claims against individual defendants, including claims for intentional infliction of emotional distress and wrongful death; and (4) claims against individual defendants for violations of international law. Only Harbury's *Bivens* claims are directly at issue in this appeal. These claims rest on three alleged constitutional violations: (1) by contributing to Bamaca's torture, CIA defendants violated his Fifth Amendment substantive due process rights; (2) by participating in and concealing information about Bamaca's torture and murder, all defendants violated Harbury's constitutional right to familial association; and (3) by concealing information and misleading her about her husband's fate, NSC and State Department defendants violated her right of access to courts.

The district court dismissed Harbury's *Bivens* claims, finding with respect to each not only that she failed to allege a deprivation of an actual constitutional right, but also that even if she had, defendants were entitled to qualified immunity because the scope of the alleged right was not clearly established. Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of Harbury's *Bivens*

claims as final. We review *de novo* a dismissal for failure to state a claim upon which relief can be granted, accepting the facts as alleged in the complaint. *See Moore*, 65 F.3d at 192. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

II

Harlow v. Fitzgerald holds that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Following *Harlow* and abiding by the familiar practice of avoiding unnecessary adjudication of constitutional questions, many courts faced with claims resting on constitutional rights of uncertain scope have dismissed cases based on qualified immunity alone. *See, e.g., Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1552 (11th Cir. 1987). In other words, "assum[ing], arguendo, without deciding" that a constitutional right in fact exists, courts have asked whether the right is clearly established. *See id.*

The Supreme Court cast doubt on this approach in *Wilson v. Layne*: "A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation omitted). As the Court had previously recognized, "if the policy of avoidance [of unnecessary adjudication of constitutional

issues] were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Notwithstanding *Wilson*, the Government urges us to dispose of this case based on qualified immunity without reaching the merits of Harbury's underlying claims. In support of this argument, it cites our recent decision in *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000), where the district court had dismissed a complaint brought by a federal prisoner claiming that the Bureau of Prisons had denied him his First Amendment right to practice secular humanism. Without reaching the merits of Kalka's constitutional claim, we affirmed based on qualified immunity alone. The Supreme Court's concern that the scope of the underlying constitutional right would never be adjudicated, we held, had "little force when injunctive relief against the official's actions is potentially available." *Id.* at 97. Although Kalka's own claim for injunctive relief had become moot (he had been released from prison during his appeal), "there is still the potential that other prisoners who practice humanism may bring such suits and settle the question whether humanism . . . is a religion within the First Amendment. This possibility of injunctive actions satisfies the Court's desire for 'clarity in the legal standards for official conduct.'" *Id.* (quoting *Wilson*, 526 U.S. at 609, 119 S.Ct. 1692).

In certain respects, this case does resemble *Kalka*. Like Kalka, Harbury alleges that the challenged government conduct is ongoing: in a part of her suit not before us, Harbury claims that the government still extracts information through torture and covers up information about the victims. Also like Kalka, Harbury herself is no longer subject to the challenged conduct: Bamaca's torture ended with his death, and sufficient facts

about U.S. involvement in his treatment have come to light to enable Harbury to seek legal relief.

At this point, however, the similarities with *Kalka* end. Harbury has been able to challenge the conduct of the government only because its cover-up failed. If the cover-up had succeeded, Harbury would have learned neither of CIA involvement in her husband's torture nor of NSC and State Department attempts to keep that involvement secret. Thus, unlike in *Kalka*, where future secular humanist prisoners could seek injunctive relief for denial of First Amendment rights (so long as they remained incarcerated), the very nature of the conduct Harbury challenges renders unlikely the possibility of injunctive relief: another spouse in Harbury's position could challenge her husband's torture only if she learned of the torture before it ended. In essence, the Government asks us to defer adjudication of the constitutionality of its alleged conduct until it again fails in a cover-up, this time before the victim dies. Nothing in *Kalka* requires such a preposterous result.

Applying *Wilson*, then, we must address the validity of Harbury's constitutional allegations before reaching the question of qualified immunity. It is to that task that we now turn.

Fifth Amendment

Government conduct that "shocks the conscience" violates the Fifth Amendment guarantee against deprivation of "life, liberty, or property, without due process of law." *See Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205, 96 L.Ed. 183 (1952). No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by Harbury shocks the conscience. *See id.* at 172, 72 S.Ct. 205 (interrogation methods were "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut*, 302 U.S. 319, 326, 58 S.Ct. 149, 82 L.Ed. 288

(1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental"). The difficult question, and the one presented by this case, is whether the Fifth Amendment prohibits torture of non-resident foreign nationals living abroad. Before reaching that question, however, we must consider Harbury's claim that because many of the CIA, NSC, and State Department officials who she says conspired to torture her husband did so within the United States, this case does not require extra-territorial application of the Fifth Amendment.

In support of this argument, Harbury cites *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984), which involved a Colombian citizen whose Swiss bank accounts were seized by Swiss authorities at the request of the U.S. Department of Justice. Despite the fact that the seized accounts were located in Switzerland, we suggested in dicta that the plaintiff might be able to establish injury within the U.S. by showing that her accounts were seized as a result of an unlawful conspiracy within the Justice Department. *Id.* at 913. Harbury also cites *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991), which involved allegations that the U.S. Government violated the Establishment Clause of the First Amendment by giving grants to foreign religious schools. Even though the money was delivered and spent abroad, the court held that the alleged violation of the Establishment Clause was domestic because it occurred when the federal agency allocated the funds. *Id.* at 834.

Harbury fails to notice the relevance of *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), a case she cites later in her brief, where the Supreme Court held that a warrantless search and seizure of an alien's property in Mexico did not violate the Fourth Amendment. The search was conceived, planned, and ordered in the United States, carried out in part by agents of the United

States Drug Enforcement Agency, and conducted for the express purpose of obtaining evidence for use in a United States trial. *See id.* at 262-63, 110 S.Ct. 1056. Still, the Court treated the alleged violation as having "occurred solely in Mexico." *Id.* at 264, 110 S.Ct. 1056. In reaching this conclusion, the Court never mentioned that the search was both planned and ordered from within the United States. Instead, it focused on the location of the primary constitutionally significant conduct at issue: the search and seizure itself.

We think *Verdugo-Urquidez* controls this case. Like the warrantless search there, the primary constitutionally relevant conduct at issue here – Bamaca's torture – occurred outside the United States. The same was not true in *Lamont*. And *Cardenas*, on which Harbury also relies, was decided prior to *Verdugo-Urquidez*. We thus turn to Harbury's primary claim – that Bamaca was entitled to Fifth Amendment protection even though the torture occurred in Guatemala.

Acknowledging that aliens are entitled to fewer constitutional protections than citizens, *see Mathews v. Diaz*, 426 U.S. 67, 77-79, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), and that constitutional protections (even for citizens) diminish outside the U.S., *see Verdugo-Urquidez*, 494 U.S. at 270, 110 S.Ct. 1056, Harbury argues that the Constitution's most fundamental protections, like the Fifth Amendment prohibition of torture, apply even to foreign nationals located abroad. In support of this claim, she cites three lines of cases holding that non-citizens outside the United States enjoy constitutional rights. First, courts have held that inhabitants of nonstate territories controlled by the U.S. – such as unincorporated territories or occupation zones after war – are entitled to certain "fundamental" constitutional rights. *See Examining Bd. of Eng'rs., Architects & Surveyors v. Otero*, 426 U.S. 572, 599 n.30, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13, 42 S.Ct. 343, 66 L.Ed. 627 (1922);

United States v. Tiede, 86 F.R.D. 227, 242-44 (U.S.Ct.Berlin 1979). Courts have also held that excludable aliens – aliens apprehended outside the U.S. while attempting to cross the border and held within the U.S. pending trial – likewise enjoy basic due process rights against gross physical abuse. *See Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987), *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). Finally, courts have suggested that non-resident aliens abducted by the government for trial within the United States have basic due process rights. *See United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *see also United States v. Lambros*, 65 F.3d 698, 701 (8th Cir. 1995).

Although these cases demonstrate that aliens abroad may be entitled to certain constitutional protections against mistreatment by the U.S. Government, we do not agree that they establish that Bamaca's torture ran afoul of the Fifth Amendment. To begin with, in adjudicating the application of constitutional rights to aliens, the Supreme Court has looked – among other factors – to whether the aliens have "come within the territory of the United States and developed substantial connections with this country." *See Verdugo-Urquidez*, 494 U.S. at 271, 110 S.Ct. 1056. In all three sets of cases Harbury cites, the aliens had a substantially greater connection to the U.S. than Bamaca. The excludable alien cases involved persons physically present in the U.S. The occupation zone cases involved foreign nationals under de facto U.S. political control. And although the alien in *Toscanino* had been tortured in a foreign country, he was abducted to and tried in the United States. In fact, the Second Circuit, treating the torture and abduction as part of the pre-trial process, focused on the fact that allowing the government to seize and torture defendants before bringing them to trial would threaten the integrity of the United States judicial process. *See Toscanino*, 500 F.2d at 275-79. In contrast to the aliens involved in these cases, Bamaca was not physically present in the United States, not

tortured in a country in which the United States exercised de facto political control, and not abducted for trial in a United States court.

Even if the cases Harbury cites were not so easily distinguishable, this issue would also be controlled by *Verdugo-Urquidez*. Though that case involved extraterritorial application of the Fourth Amendment, the Court also dealt with the extraterritorial application of the Fifth:

> Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager* . . . the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment. . . . The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." But our rejection of the extraterritorial application of the Fifth Amendment was emphatic:
>
> > "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has

> > even hinted at it. The practice of every modern government is opposed to it."

Id. at 269, 110 S.Ct. 1056 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770, 784-85, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)). To be sure, as Harbury points out, this language is dicta. But it is firm and considered dicta that binds this court. *See, e.g., United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) ("[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (internal quotation omitted). Harbury also correctly observes that *Eisentrager* – the case relied on by *Verdugo-Urquidez* – concerned rights of enemy aliens during wartime. But the Supreme Court's extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited. For these reasons, we agree with the district court that Harbury failed to allege a valid claim for deprivation of her husband's Fifth Amendment due process rights.

Familial Association

The Constitution protects familial relationships from unwarranted government interference in at least two circumstances. First, parents have a right to maintain their relationship with their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (holding that a state must support allegations of parental neglect with at least clear and convincing evidence before terminating the rights of parents in their natural child); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (striking down a law automatically making children of unwed fathers wards of the State upon the death of their mother). Second, family members have a constitutional right to make certain private decisions regarding family affairs, such as whether to procreate, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)

(abortion), *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (contraception), or whether to send children to public school, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Harbury's claims rest on both categories of rights.

Relying on the first category, Harbury argues that by murdering Bamaca, CIA defendants unconstitutionally deprived her of her right to continuing association with her husband. The district court dismissed this claim because Harbury failed to allege that the defendants murdered Bamaca for the purpose of ending her marriage. Urging us to reverse, Harbury argues that the district court's purpose requirement conflicts with Supreme Court cases finding due process violations in circumstances involving far less serious interference with familial relationships – such as laws requiring children to attend public schools – and no direct purposeful interference with the family. To be sure, these cases involve the second category of rights – the right to make private familial decisions – but Harbury argues that there is no principled reason to impose a purpose requirement in the first category and not the second. Harbury also argues that since officials will likely never kill anyone for the purpose of terminating a marriage, a purpose requirement effectively eviscerates familial association claims based on wrongful killings.

Our sister circuits have split on whether familial association claims require allegations of purposeful interference. Some circuits have held that the Due Process Clause only protects against direct, intentional interference with familial relationships. In *Ortiz v. Burgos*, for example, the First Circuit held that the stepfather and siblings of a prisoner beaten to death by guards had no independent cause of action for loss of familial association because the beating was not specifically intended to deprive them of their association with the decedent. 807 F.2d 6, 8 (1st Cir. 1986); *see also Shaw v. Stroud*, 13 F.3d 791,

804-05 (4th Cir. 1994); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987); *Trujillo v. Bd. of County Comm'rs.*, 768 F.2d 1186, 1189-90 (10th Cir. 1985). But other circuits have held in cases of wrongful killings of children that the surviving parent had an independent due process claim, even though the killing was not specifically intended to disrupt the parent-child relationship. In one such case, *Bell v. City of Milwaukee*, the Seventh Circuit held that the father (but not the siblings) of a decedent wrongfully killed by the police had a constitutional claim for loss of association with his son even though the killing was motivated by racism, not intent to deprive him of his son's companionship. 746 F.2d 1205, 1242-48 (7th Cir. 1984); *see also Smith v. City of Fontana*, 818 F.2d 1411, 1417-20 (9th Cir. 1987); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985).

In considering Harbury's claim, we are mindful of the caution we must exercise in expanding the liberty interests protected by substantive due process. "As a general matter," the Supreme Court said in *Collins v. Harker Heights*, "[we have] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self- restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (citation omitted).

Bearing this caution in mind, as well as the obvious proposition that it operates with even greater force on the lower federal courts, we think that two features of Supreme Court precedent bar us from accepting Harbury's claim. First, although the Court has never directly addressed the issue in the context of a wrongful killing, it has found a constitutional right to continuing association with family members only in cases involving direct, purposeful interference with familial

relationships. *See, e.g., Stanley*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; *Santosky*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599. As the First Circuit observed, the Court has "never held that governmental action that affects the parental relationship only incidentally . . . is susceptible to challenge for a violation of due process." *Ortiz*, 807 F.2d at 8. Equally significant, the Supreme Court has recognized a right to continuing familial association only in cases involving parent-child relationships. In doing so, the Court has emphasized the importance of the parent-child bond. *See, e.g., Stanley*, 405 U.S. at 651, 92 S.Ct. 1208 (noting that the Court had previously deemed the rights to conceive and raise one's children as " essential," "basic," and "far more precious . . . than property rights"); *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388 (referring to the "fundamental liberty interest of natural parents in the care, custody, and management of their child," and to parents' "vital interest in preventing the irretrievable destruction of their family life"). Even circuit court cases that have expanded the right to include indirect deprivations of association involve only parent-child relationships. *See Bell*, 746 F.2d at 1242-48; *Smith*, 818 F.2d at 1417-20; *Estate of Bailey*, 768 F.2d at 509 n.7. And in one such case, *Bell*, the court expressly declined to broaden the right to include the decedent's surviving siblings. *See* 746 F.2d at 1245-48.

Harbury's claim thus lies beyond Supreme Court precedent in not one but two respects: it concerns neither a parent-child relationship nor purposeful interference with a familial relationship. On the facts of this case, therefore, we need not decide whether the constitutional right to continuing familial association requires allegations of purpose to interfere with the right, nor whether the constitutional right to familial association extends to the marriage relationship. We hold only that in view of Supreme Court precedent and in light of the Court's admonition in *Collins*, we cannot extend a constitutional right to familial association to cases where, as

here, the government has indirectly interfered with a spousal relationship. The First Circuit, declining to extend due process protection to incidental deprivations of familial association, used language we think particularly compelling:

> Although we recognize and deplore the egregious nature of the alleged government action in this case, we hesitate, in the rather novel context of this case, to erect a new substantive right upon the rare and relatively uncharted terrain of substantive due process when case law, logic and equity do not command us to do so. It does not necessarily follow that the incidental deprivation of even a natural parent's parental rights is actionable simply because the relevant deprivation of life is shocking. In addition, a conclusion that governmentally caused termination of, or encroachment on, the parental interest in the continued relationship with a child always is actionable would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny, including the alleged wrongful prosecution and incarceration of a child or the alleged wrongful discharge of a child from a state job, forcing the child to seek employment in another part of the country. Moreover, the problem of giving definition and limits to a liberty interest in this vast area seems not only exceedingly difficult but to a considerable extent duplicative of the widespread existence of state causes of action, as in this case, which provide some compensation to grieving relatives.

Ortiz, 807 F.2d at 9. Emphasizing that it sought "neither to

minimize the loss of a family member nor to denigrate the fundamental liberty interest in matters of family life that has long been a part of our constitutional fabric," the First Circuit concluded: "even an interest of great importance may not always be entitled to constitutional protection. . . . Our conclusion is simply that, in light of the limited nature of the Supreme Court precedent in this area, it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to the facts of this case." *Id.* at 9-10 (citations omitted). For essentially similar reasons, we are doubly reluctant to make the even broader expansion of the right to familial association sought by Harbury.

Harbury's second familial association claim, this one brought against State Department and NSC defendants, charges that their failure to disclose information about Bamaca violated her right to make intimate personal decisions about her marriage. To support this claim, she cites *Planned Parenthood v. Casey*, where the Supreme Court stated that decisions within the "private realm of family life" are among "the most intimate and personal choices a person may make in a lifetime," and are "central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Relying on this broad language, Harbury asserts that she had a due process right to decide how best to save her husband from torture and retrieve his remains and bury him after he died. Defendants, she urges, prevented her from making these decisions by concealing information about his torture and death.

We agree with the district court that Harbury's claim lacks foundation in constitutional jurisprudence. The broad general principle Harbury cites appears never to have been applied to a situation even remotely like hers. Nor does she explain why it should be. We therefore decline to extend the right in the manner she proposes.

III

This brings us to our only area of disagreement with the district court: Harbury's access to courts claim. "[T]he right to sue and defend in the courts," the Supreme Court long ago said, "is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). The right not only protects the ability to get into court, *see, e.g., Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (striking down a prison regulation prohibiting prisoners from filing petitions for habeas corpus unless they are found "properly drawn" by a state official), but also ensures that such access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

Applying this standard, several of our sister circuits have found that government cover-ups can infringe the right of access to courts. In *Bell*, 746 F.2d 1205, for example, city police officers planted evidence and contrived a false story to make their killing of an unarmed man whom they shot in the back seem an act of self-defense. The victim's father filed a wrongful death action against both the officer and the city, but the case settled for an amount so small that the father never cashed the check. When the true facts of the killing emerged twenty years later, the victim's survivors sued the police, alleging that the conspiracy to conceal the facts had interfered with their ability to seek legal redress. Sustaining a jury verdict for plaintiffs, the Seventh Circuit found that "[t]hough [Bell's father] filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress. . . ." *Id.* at 1261.

The Fifth Circuit reached a similar result in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), recognizing a potential denial of the right of access when an alleged cover-up delayed release of the facts of a murder for eleven months. Noting that "[d]elay haunts the administration of justice," the court held that the victim's parents could state a denial of access claim since "[t]he defendants' actions could have prejudiced [their] chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses." *Id.* at 974, 975; *see also Swekel v. City of River Rouge*, 119 F.3d 1259, 1263-64 (6th Cir. 1997) (plaintiff must "[show] that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had"); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (same); *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (plaintiffs must allege either that they have "been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up"); *cf. Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

Citing *Bell*, *Ryland*, and other similar cases, Harbury argues that NSC and State Department defendants, by giving her "false and deceptive information related to her husband and otherwise concealing whether he was alive, . . . deprived Plaintiff of her right . . . to adequate, effective, and meaningful access to the courts." Complaint ¶ 174. The Government responds that Harbury "failed to identify a . . . constitutional right to have federal officials report on what they knew about a foreign revolutionary leader captured by a foreign government on the field of battle." Appellee's Br. at 14. According to the Government, this failure distinguishes Harbury's case from *Bell* and other cases where police officers charged with investigating

a crime destroy, conceal, or manufacture evidence in violation of statutory duties.

We think the Government misreads Harbury's complaint. She never alleges that defendants breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her into believing that they were actively seeking information about her husband. Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf, intending to prevent her from suspecting that the U.S. Government was actually involved in Bamaca's torture. One of their express objectives, Harbury alleges, was to prevent her from suing them. Viewed this way, and regardless of whether State and NSC officials had an affirmative duty to provide information to Harbury in the first place, the complaint states a clear case of denial of access to courts. *Cf. Barrett*, 798 F.2d 565, 575 (though defendant government officials "were not under any duty to volunteer to the estate information that would alert it to the existence of a claim against the federal government and certain of its officials . . . government officials were not free to arbitrarily interfere with the estate's vindication of its claims").

The district court, though agreeing that Harbury might be able to base an access to courts claim on the alleged cover-up, nevertheless dismissed her claim because she had not yet finished prosecuting the tort claims also pleaded in her complaint. In reaching this conclusion, the district court relied on *Swekel*, where the Sixth Circuit rejected an access to courts claim because the plaintiff had not yet filed suit in state court: "Before filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" 119 F.3d at 1264. The district court also cited *Delew*, 143 F.3d 1219, where the Ninth Circuit dismissed

an access to courts claim even though the plaintiff, unlike the plaintiff in *Swekel*, had actually filed a wrongful death action based on the same set of facts. Stating that "because the [plaintiffs'] wrongful death action remains pending in state court, it is impossible to determine" whether "the defendants' cover- up violated [the plaintiffs'] right of access to the courts by rendering 'any available state court remedy ineffective,'" the court gave plaintiffs leave to re-file "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." *Id.* at 1222-23.

In some ways this case does resemble *Swekel* and *Delew*. Like plaintiffs in those cases, Harbury alleges that due to the cover-up, "key witnesses . . . may now be dead or missing, . . . crucial evidence may have been destroyed, and . . . memories may have faded." *Harbury v. Deutch*, No. 96-00438 (D.D.C. filed Mar. 23, 1999) at 18. If her complaint rested solely on such allegations, we might agree with the district court. But Harbury's complaint goes further: not limited to wrongful death and intentional infliction of emotional injury, it alleges that but for the cover-up, she might have been able to save her husband's life. "As a result of the fraudulent statements and intentional omissions made by the Department of State and the [NSC] defendants . . . Plaintiff was unable to take appropriate actions to save her husband's life. Specifically, Plaintiff was foreclosed from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media." Complaint ¶ 98. Amplifying this point at oral argument, Harbury's counsel explained that if defendants had disclosed the information they possessed about Bamaca, Harbury could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress. Even if the NSC and State Department officials had simply said they could not discuss Bamaca's situation, counsel explained, Harbury would have filed her FOIA requests

immediately, thus perhaps obtaining the information necessary to seek an injunction in time to save her husband's life. Instead, believing defendants' reassurances, Harbury waited for the State Department and NSC officials to complete their "investigation."

If Harbury's allegations are true, then defendants' reassurances and deceptive statements effectively prevented her from seeking emergency injunctive relief in time to save her husband's life. Because his death completely foreclosed this avenue of relief, nothing would be gained by requiring Harbury to postpone this aspect of her access to courts cause of action until she finishes prosecuting her tort claims.

The Government offers another reason for affirming the district court. Relying on *Swekel*, it argues that since Harbury "always had the option to file suit with or without information from any defendant," her claim should be dismissed based on her failure to file such a suit. *See* Appellee's Br. at 15 n.5 and accompanying text. But again, *Swekel* is very different from this case. There, police allegedly concealed the identity of a potential defendant involved in a fatal accident until after the statute of limitations had run. When the victim's spouse filed a deprivation of access to courts claim, the Sixth Circuit dismissed, observing that "[no] evidence . . . establishes that [plaintiff] even attempted to go to the state court in the first instance." *Swekel*, 119 F.3d at 1264. The trial court, moreover, had found that the plaintiff had been aware of all essential facts of the accident except the defendant's identity, and thus could have filed a "John Doe" suit despite the cover-up. *See id.* at 1261. Harbury, in contrast, asserts that she "had no idea that the United States Government was aware of, much less involved in, her husband's detention and torture." Thus "unaware that there was a potential claim of any kind against any U.S. officials," Harbury had "no reason to believe that she could state a claim in United States courts." Appellant's Reply Br. at 14. Unlike in *Swekel*, therefore, not only did defendants allegedly

deprive Harbury of any opportunity to seek relief in the courts, but they effectively concealed most of the "essential facts" of the case, including U.S. Government involvement, until after emergency injunctive relief would have been futile. *Cf. Swekel*, 119 F.3d at 1264 n.2 (recognizing that plaintiff need not file a prior suit if "it would be completely futile for a plaintiff to attempt to access the state court system").

Concluding that Harbury has pleaded an access to courts claim, however, does not end our task, for the district court also found that even if Harbury could bring such a claim, defendants would be entitled to qualified immunity. For purposes of qualified immunity, it is not enough for a plaintiff to allege that a defendant's conduct violated a right that is clearly established in general terms. Instead, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

Applying this standard, the district court dismissed Harbury's access to courts claim because it includes no allegation of "nefarious conduct," such as manufacturing false evidence or destroying or refusing to collect evidence. *See Harbury*, No. 96-00438 at 19-20. Harbury claims only that defendants denied knowledge of Bamaca's torture and made "allegedly disingenuous overtures to assist her." *See id.* at 20. Because of this, and because State Department and NSC defendants did not conceal details about "local crimes" they were charged with investigating, but rather information about a "highranking commander of the Guatemalan National

Revolutionary Union resistance forces" who had been captured during an armed conflict with the Guatemalan army, the district court ruled that it "[could not] hold that Ambassador McAfee, NSA Lake, or the unnamed State Department and NSC defendants would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." *Id.* at 20-21.

We read Harbury's complaint quite differently. For one thing, as we have already shown, Harbury alleges not that defendants violated an affirmative duty to provide information, but that they affirmatively misled her. *See supra* at 608. Furthermore, defendants misled her, she alleges, precisely *because* they feared that if they gave her accurate information about Bamaca's fate, she might sue them. The relevant inquiry in Harbury's case, then, is this: would an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead Harbury for the express purpose of preventing her from filing a lawsuit? *Cf. Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1992).

–Before answering this question, we must dispose of the Government's argument that under *Harlow*, any inquiry into defendants' purpose in misleading Harbury is irrelevant to their qualified immunity defense. It is true that *Harlow* holds that an official's "subjective good faith" is irrelevant to evaluating a claim of qualified immunity. *See Harlow*, 457 U.S. at 815-19, 102 S.Ct. 2727. But we have understood *Harlow* principally to prevent inquiry into officials' knowledge or beliefs about the *legality* of their conduct. Except in national security cases – and the Government has not yet raised a national security defense in this case – we have not read *Harlow* to prohibit inquiry into an official's motives unrelated to knowledge of the law, when "a bad [motive] could transform an official's otherwise reasonable conduct into a constitutional tort." *See Crawford-El*, 951 F.2d at 1317; *see also Halperin v. Kissinger*, 807 F.2d 180, 186

(D.C. Cir. 1986) ("No court, as far as we are aware, has extended *Harlow*'s proscription of subjective inquiry beyond the issue of knowledge of the law and intent related to knowledge of the law, except in a national security context."). The Supreme Court, moreover, has not only confirmed that *Harlow* allows inquiry into intent unrelated to knowledge of the law, but also held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard. *See Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

Returning to the question before us – Should it have been clear to an objectively reasonable official that affirmatively misleading Harbury for the purpose of preventing her from filing a lawsuit would violate her constitutional rights? – we think the answer is plainly yes. Not only have five of our sister circuits held that cover-ups that conceal the existence of a cause of action (or make it difficult to prosecute one) infringe the constitutional right of access to courts, and not only are we unaware of any contrary decision, but we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit. *Harlow* developed qualified immunity to protect public officials from "insubstantial lawsuits" that threatened to "[divert] official energy from pressing public issues" and "[deter] able citizens from acceptance of public office," as well as to ensure that these officials could exercise their discretion without fear of suit. *See Harlow*, 457 U.S. at 814, 102 S.Ct. 2727. Qualified immunity was never intended to protect public officials who affirmatively mislead citizens for the purpose of protecting themselves from being held accountable in a court of law. Joining our sister circuits, we therefore hold that when public officials affirmatively mislead citizens in order to prevent them from filing suit, they violate clearly established constitutional rights and thus enjoy no qualified immunity.

IV

In conclusion, we reiterate what we said at the outset: because the district court dismissed Harbury's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), our task is to assess neither the strength nor plausibility of Harbury's allegations, but to determine whether, assuming the truth of her allegations, "[she] can prove [any] set of facts in support of [her] claim which would entitle [her] to relief." *Conley*, 355 U.S. at 45- 46, 78 S.Ct. 99. Applying that standard, we reverse the district court's dismissal of Harbury's access to courts claim and remand for further proceedings. In all other respects we affirm.

So ordered.

APPENDIX B

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

MEMORÁNDUM OPINION

Jennifer Harbury, the widow of a Guatemalan rebel who was tortured and killed by Guatemalan army officers, has brought suit against the Central Intelligence Agency, the National Security Council, the State Department, and individual employees within each agency under the Constitution, state common law, and international law. Pending before the Court are the Defendants' motion to dismiss, Harbury's opposition thereto, and the Defendants' reply. For the reasons set forth below, the motion is granted in part and denied in part.

I. FACTS

Plaintiff Jennifer Harbury seeks monetary damages and declaratory and injunctive relief in connection with the alleged torture and execution in Guatemala of her husband, Efrain Bamaca-Velasquez ("Bamaca"). Plaintiff names as defendants the Central Intelligence Agency ("CIA"), the United States Department of State ("State Department"), the National Security Council ("NSC"), seventeen CIA employees, five State Department employees, two NSC employees, and unnamed employees at each agency. Plaintiff has sued the defendant employees in both their official and individual capacities.

The twenty-eight causes of action in the amended complaint fall into four broad categories: (1) claims for declaratory and injunctive relief for alleged constitutional violations; (2) constitutional claims under *Bivens* against the individual defendants in their individual capacities; (3) common-law tort claims against the individual defendants in their individual capacities; and (4) claims for violations of international law against the individual defendants in their individual capacities.

II. OFFICIAL CAPACITY CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

The doctrine of sovereign immunity insulates the United States from suit except on such exact terms as Congress authorizes. *See Honda v. Clark*, 386 U.S. 484, 501 (1967). Within the ambit of sovereign immunity also fall cases in which the plaintiff seeks relief from government officials sued in their official capacities because such suits are considered to be directed against the sovereign itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Invoking this jurisdictional bar, the federal defendants claim that Harbury's request for declaratory and injunctive relief against officials in their official capacities mandates dismissal.

Although other problems plague Harbury's injunctive and declaratory-judgment actions, sovereign immunity is not one of them. What eludes the federal defendants is the well-recognized *Larson-Dugan* exception, which "holds that sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the grounds that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)); *see also Dugan v. Rank*, 372 U.S. 609, 621-23 (1963). Were it established that

the federal defendants acted beyond the limits that the Constitution imposes on them, Harbury could prosecute her claims for declaratory and injunctive relief without a waiver of sovereign immunity.

While sovereign immunity does not deprive this Court of subject-matter jurisdiction, Harbury's inability to establish standing does. Article III of the Constitution vests "[t]he judicial Power of the United States ... in one supreme Court, and in such inferior Courts as the Congress may ... establish." U.S. CONST. art. III, § 1. The judicial power that federal courts possess, however, is circumscribed to "cases" or "controversies." *See id.; see also Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997). To establish the "irreducible constitutional minimum of standing," *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996), a plaintiff must demonstrate that (1) she has suffered "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), (2) the injury is "fairly traceable" to the defendant's actions, *see Bennett*, 117 S. Ct. at 1161, and (3) a favorable judicial ruling will likely redress the plaintiff's injury. *See id.* at 1161; *Lujan*, 504 U.S. at 560-61; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (en banc). Taken together, these requirements are "core components' which are 'essential and unchanging parts of the case-or-controversy requirement of Article III.'" *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting *Lujan*, 504 U.S. at 560) (brackets omitted).

Harbury seeks, *inter alia*, an injunction enjoining "[d]efendants from taking such actions in the future." 2d Am. Compl. at 53 (Prayer for Relief ¶ (a)(iii)). As a practical matter, the requested injunction is so broad as to be nearly unintelligible – the fifty-three-page Second Amended Complaint enumerates

an extraordinary number of actions to which Harbury objects. After carefully examining Harbury's allegations and concerns, the Court construes her claims for equitable and declaratory relief in Counts 1-3, 6-9, 14, and 16 as a prayer for an injunction (1) enjoining the CIA from its alleged practices of extracting information through torture, purchasing information that has been extracted through torture, and maintaining foreign agents without regard for human rights abuses, *see* 2d Am. Compl. ¶¶ 104, 108, 113, 126, 131; and (2) enjoining the NSC and State Department from their alleged policies of providing false information regarding "the fate of anyone injured or killed through the CIA's long-standing policy ... related to the extraction of information" through torture. *See* 2d Am. Compl. ¶¶ 137, 143, 167, 179.

In seeking such a broad equitable decree, Harbury stakes her constitutional standing to a single perceived injury: that she "still has in-laws in Guatemala and wishes to someday return to live in Guatemala" and would be "at risk of suffering similar harms" from the CIA's alleged policies of securing information "through severe torture." *See* 2d Am. Compl. ¶ 96. Constitutional standing, however, requires the plaintiff to demonstrate that the harm that she seeks to enjoin be "*certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (emphasis in original). As this Circuit recently observed, "[i]t is not enough for the [Plaintiff] to assert that [she] might suffer an injury in the future, or even that [she] is likely to suffer an injury at some unknown future time." *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996). Indeed, with language perfectly tailored to Harbury's claim that she "wishes to *someday* return to live in Guatemala," 2d Am. Compl ¶ 96, the D.C. Circuit has held that "[s]uch 'someday' injuries are insufficient." *MacArthur Found.*, 102 F.3d at 606.

Moreover, the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), underscores Harbury's

inability to press her claims for injunctive and declaratory relief. In *Lyons*, after nearly being strangled at the hands of police officers who inflicted a brutal chokehold, the plaintiff sought both damages and an injunction against the police department. Despite the plaintiff's past injury, the Supreme Court held that he lacked standing to pursue an injunction against the police department's use of chokeholds. To be able to seek prospective relief from future illegality, the plaintiff's standing "depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. Although acknowledging the possibility that "there will be certain instances in which strangleholds will be illegally applied and injury ... unconstitutionally inflicted upon the victim," the Court thought it "no more than speculation to assert ... that Lyons himself will again be involved in one of those unfortunate instances." *Id.* at 108. Like the plaintiff in *Lyons*, Harbury lacks standing to seek an injunction against alleged future illegality because she "has made no showing that [s]he is realistically threatened by a repetition of [her] experience." *Id.* at 109. What is more, this rationale transcends her claim for declaratory judgment as well; for as this Circuit has concluded, the Supreme Court's holding in *Lyons* "would also have kept him from bringing suit for declaratory relief." *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994); *accord Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987); *see also Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). *City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1429 n.6 (D.C. Cir. 1994) ("[R]equests for declaratory relief which aim to prevent future illegal acts often will implicate standing concerns."). Accordingly, Harbury's claims for injunctive and declaratory relief shall be dismissed for lack of subject-matter jurisdiction.

III. *BIVENS* ACTIONS AGAINST OFFICIALS IN THEIR INDIVIDUAL CAPACITIES

A. *Brief Overview of Qualified Immunity*

While *Bivens* actions are intended to provide an avenue for vindicating constitutional rights, qualified immunity exists to ensure that the specter of monetary liability and harassing litigation will not unduly inhibit officials as they discharge their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Qualified immunity turns on the "objective legal reasonableness" of the action as assessed in light of the legal rules that were "clearly established" at the time the action was taken. *See id.* at 819.

In *Anderson v. Creighton*, 483 US. 635 (1987), the Supreme Court clarified the qualified-immunity standard. *Anderson* held that the right at issue must be particularized, not a general abstract claim to violation of "due process." Obviously, it is clearly established that government may not deprive someone of due process, but for qualified immunity to mean anything, the contours of the specific due-process right claimed must be defined in a more fixed, concrete fashion. In reviewing its qualified-immunity jurisprudence, the Supreme Court observed that

> Our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously

> been held unlawful, but is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 482 U.S. at 640 (citations omitted). This standard governs Harbury's *Bivens* claims.

B. *Whether the alleged conspiracy to torture and execute Bamaca violates a clearly established right.*

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. As framed by Harbury, the issue presented by Bamaca's torture and execution is: "whether the substantive due process protection afforded by the Fifth Amendment prohibits the government from engaging in the torture and murder of a foreign national on foreign soil." Pl.'s Opp'n at 11. Conceptualizing substantive due process as a general check on the federal government's power that transcends national borders, Harbury argues that the CIA defendants violated Bamaca's clearly established rights under the Fifth Amendment. Without eschewing the horror and grotesque treatment that Bamaca endured, the Court is bound by precedent to reject this constitutional claim.

Harbury suggests that the Fifth Amendment's promise of substantive due process acts as a general restraint on all actions that the federal government undertakes. Regardless of where or against whom the federal government acts, Harbury argues that the Fifth Amendment proscribes actions that shock the conscience. To support this claim, Harbury cites a number of cases that stand for the rather unremarkable, though fundamental, proposition that "substantive due process prevents the government from engaging in conduct that 'shocks that conscience.'" *United States v. Salerno*, 481 U.S. 739, 746

(1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)); *see also Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("[C]onduct that shocks the conscience or afford[s] brutality the cloak of law ... violates the [Due Process Clause]."); *Palko v. Connecticut*, 302 U.S. 319, 326 (noting that the Due Process clause could be construed to "give protection against torture"). From this premise, she leaps to conclude that the Due Process Clause's prohibition on conduct that shocks the conscience tempers every federal action.

Unlike other provisions in the Constitution, the Due Process Clause does not purport to establish a general prohibition on government conduct. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art I. § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."); *id.* art, I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...."); *id.*, art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States."). The Bill of Rights – and particularly the Fourth and Fifth Amendments – vest *individuals* with the rights that the government is constitutionally bound to respect. Thus the Fourth Amendment speaks in terms of "[t]he right of the people" and the Fifth Amendment offers its protections to a "person." They do not establish general limits on how government may act, but demarcate how government may act to certain *persons*. It comes as no surprise then to learn that this Circuit has held that "Fifth Amendment rights are, a fortiori, *personal* rights." *Bryson v. United States*, 419 F.2d 695, 699 (D.C. Cir. 1969) (emphasis added). A criminal defendant, for example, may not invoke the Fifth Amendment to exclude evidence obtained in violation of his co-conspirator's right against self-incrimination. This is not an issue of standing but a question of the substantive contours of the right. *See id.* Indeed, just this term, the Supreme Court reaffirmed that because the Fourth Amendment "protects persons against

unreasonable searches of 'their persons [and] houses,' the Fourth Amendment "is a *personal* right that must be invoked by an individual." *Minnesota v. Carter*, 119 S. Ct. 469, 473 (1998) (emphasis added). It also noted that because the right is uniquely personal, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Id.* at 472 (quoting *Rakas v. Illinois*, 439 U.S. 128, 140 (1978)).

Because the Fifth Amendment creates personal rights, to determine whether the government has violated those rights it is essential to identify which persons enjoy the Amendment's protections. At the outset, it is useful to recall that Bamaca was not a lawful permanent resident nor even an alien who had illegally entered the United States; rather, he was a foreign national located a hemisphere away. The distinction is crucial because while "[i]t is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953), the extent to which the Constitution extends extraterritorially boasts no such clarity. *Compare Mathews v. Diaz*, 429 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.") with *Miller v. Albright*, 118 S. Ct. 1428, 1445 (1998) (Kennedy, J., concurring, O'Connor, J., joining) ("[I]t is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States."). Careful examination of Supreme Court precedent militates against recognizing the constitutional right that Harbury advocates.

Nine years ago, the Supreme Court refused to extend the Fourth Amendment's protections beyond the shores of the

United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Harbury asks this Court to brush *Verdugo-Urquidez* aside because it resolved only the extraterritorial application of the Fourth Amendment, not the Fifth Amendment. But Harbury adopts too parsimonious an interpretation of *Verdugo-Urquidez*. Though limited by the facts to the Fourth Amendment, the *Verdugo-Urquidez* opinion drew extensively from the Court's Fifth Amendment jurisprudence in marking off the metes and bounds of the Constitution's reach. Indeed, in reviewing its own precedents, the Supreme Court emphasized that "we have rejected the claims that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269.

After analyzing its prior holding in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court concluded that its "rejection of extraterritorial application of the Fifth Amendment was emphatic." *Verdugo-Urquidez*, 494 U.S. at 269. In *Johnson*, the Court found that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus for alleged violations of the Fifth Amendment. *See Johnson*, 339 U.S. at 770. Of fundamental importance to this holding was a respect for the historical origins of the Fifth Amendment:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view: None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784 (citation omitted). Moreover, five years before *Johnson*, and quoted with approval since then by the Court, Justice Murphy observed that "an alien obviously brings with him no constitutional rights .... The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); *accord Kwong Hai Chew*, 344 U.S. at 596 n.5; *Verdugo-Urquidez*, 494 U.S. at 271. And well before these cases, the Supreme Court held that "[n]either the constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect to our own citizens." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

Try as she might, Harbury offers nothing to undermine the doctrinal force of these cases. First, she relies on a passage from this Circuit's decision in *Cardenas v. Smith*, 733 F.2d 909, 915 (D.C. Cir. 1984), which posited that it is "beyond peradventure that a foreign nonresident, non-hostile alien may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States action." *Id.* From this ambiguous statement Harbury maintains that the rights of Bamaca were clearly established. Beyond its qualified rumination about the geographic scope of the Constitution, the *Cardenas* decision's most fundamental flaw is temporal: it precedes *Verdugo-Urquidez* by six years. As between *Cardenas*'s vague observation and *Verdugo-Urquidez*'s explicit understanding that the Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *Verdugo-Urquidez*, 494 U.S. at 269, the court must abide by the latter.

None of this is to say that the Constitution is so parochial that its reach never extends beyond this country's borders. Yet when it stretches to foreign lands, it does so only to offer American citizens the protections from their government that

they would otherwise enjoy were they in the United States. *See, e.g., Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (recognizing that Fifth and Sixth Amendments extended to American civilians tried in military tribunals outside of the United States); *Curtiss-Wright*, 299 U.S. at 318 ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens.")* (emphasis added). Far from representing a broad expansion of the rights accorded to aliens located abroad, the *Reid* plurality merely held that "[w]hen the Government reaches out to punish a *citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid*, 354 U.S. at 6 (emphasis added). Although the respondent in *Verdugo-Urquidez* suggested that based on *Reid* "federal officials are constrained by the Fourth Amendment wherever and against whomever they act," the Supreme Court noted that "the holding of *Reid* stands for no such sweeping proposition." *Verdugo-Urquidez*, 494 U.S. at 270.

By way of analogy, neither *Reid* nor any other case supports the sweeping proposition that Harbury posits with respect to the Fifth Amendment. Among the other cases that Harbury marshals in her defense are "entry fiction" cases. *See Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). As one circuit has summarized it, the notion of the "entry fiction" provides that "although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country." *Barrera-Echavarria v. Rison*, 44 F.3d. 1441, 1449 (9th Cir, 1995) (internal quotation omitted); *see also Shaughnessy v. Mezei*, 345 U.S. 206 (1953). Several circuits have concluded, not surprisingly, that notwithstanding the entry fiction, excludable aliens are entitled to be "free of gross

physical abuse at the hands of state and federal officials." *Lynch*, 810 F.2d at 1374. What animates these decisions, however, is not that the due-process clause operates universally but that, whatever merit there is to the entry fiction, "[i]t does not limit the right of excludable aliens detained *within United States territory* to humane treatment." *Id.* at 1373 (emphasis added). Thus, these courts are willing to pierce the entry fiction and extend the Due Process Clause to excludable aliens because they are, in fact, persons within the territory of the United States. Once the entry fiction is vitiated, case law clearly establishes that an alien "whose presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth Amendment] constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Because Bamaca, unlike the aliens at issue in *Lynch* and the other entry-fiction cases, was not remotely within the territory of the United States, Harbury's reliance on these cases is misplaced.

Finally, even if this Court were mistaken to hold that Bamaca enjoyed no protections under the Fifth Amendment, *Verdugo-Urquidez* and *Johnson* certainly underscore the tenuous and uncertain scope of that putative right. Indeed, as recently as last term, two Justices cited *Johnson* and *Verdugo-Urquidez* in concluding that "it is *unclear* whether an alien may assert constitutional objections when he or she is outside the territory of the United States." *Miller v. Albright*, 118 S. Ct. 1428, 1445 (1998) (Kennedy, J., concurring, O'Connor, J., joining) (emphasis added). Notably, unlike the *Cardenas* panel, Justices Kennedy and O'Connor did not indicate that it is unclear the *extent* to which the Constitution protects aliens abroad, but *whether* aliens may ever assert constitutional objections. *See Cardenas*, 733 F.2d at 917. Certainly where two Justices read *Johnson* and *Verdugo-Urquidez* to cast doubt on whether foreign nationals enjoy Fifth Amendment due-process rights, this Court cannot conclude that the right is "sufficiently clear that a reasonable official would understand that what he is doing

violates that right." *Anderson*, 483 U.S. at 640.[1] Accordingly, Harbury's *Bivens* claim for damages stemming from Barnaca's torture is dismissed for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12 (b)(6).

B. Harbury's Right of Access to the Courts

Among the rights enshrined by the First and Fifth Amendments is the right of access to the courts. *See Turner v. Safley*, 482 U.S. 78, 84 (1987); *Wolff v. McDonnell*, 418 U.S. 529, 579 (1974); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). Reduced to its "most obvious and formal manifestation," the right of access "protects one's physical access" to the courts. *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989). Yet more than just a formalistic promise to be able to pass through the courthouse doors, the right guarantees access that will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). To that end, many circuits have held that conspiracies to destroy or cover-up evidence of a crime that render a plaintiff's judicial remedies inadequate or ineffective violates the right of access. *See, e.g., Delew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262-64 (6th Cir 1997); *Foster v. City of Lake Jackson*, 28 F.3d 425, 429-31 (5th Cir.

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1 Recently, this Circuit tacitly acknowledged that aliens outside of the United States territory lack substantive rights under the Fifth Amendment:

> We likewise reject plaintiffs' claim that the State Department's consular venue policy violates the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiffs concede that the migrants, as aliens, may not assert a Fifth Amendment right in challenging the procedures for granting immigrant visas. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). The equal protection claim must be asserted, if at all, by the citizen sponsors of the migrants.

Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 104 F.3d 1349, 1353-54 (D.C. Cir. 1997).

1994); *Williams v. City of Boston*, 84 F.2d 430 (1st Cir. 1986) (dicta); *Bell v. City of Milwaukee 746* F.2d 1205, 1261 (7th Cir. 1984). Harbury seeks damages under *Bivens* against the State Department and NSC Defendants because they allegedly "misle[d] [her] into believing that there was no information available as to her husband's circumstances and by falsely telling her that they would investigate and convey to her of [*sic*] any information they obtained." Pl.'s Opp'n at 27. Accepting as true Harbury's allegations and viewing them in the light most favorable to her, the court concludes that she has failed to state a claim based on a denial of access to the courts. Alternatively, the officials alleged to have violated Harbury's right would be entitled to qualified immunity.

Two principal episodes form the gravamen of Harbury's right-of-access claim. First, after Harbury discovered that the grave supposedly containing Bamaca's remains was not, in fact, that of her husband, she reported this revelation to Marilyn McAfee, the United States Ambassador to Guatemala at the time. *See* 2nd Am. Compl. ¶ 61. McAfee, in turn, indicated that she would investigate the matter immediately, report her findings to Harbury, and keep her properly informed about her husband's situation. *See id.* ¶ 62. According to Harbury, Ambassador McAfee and the other unnamed State Department Defendants mislead her, through allegedly deceptive statements and omissions, into believing that there did not exist any concrete information concerning her husband. *See id.* ¶¶ 67-68, 75.

During late November of 1994, the second instance of alleged deception occurred. After the State Department eventually released an official statement (prompted by a "60 Minutes" report that the U.S. Embassy in Guatemala had information about Bamaca) confirming that Bamaca was captured alive but purporting to know nothing more, Harbury met with National Security Advisor Anthony Lake. *See id.* ¶¶

81-83. NSA Lake apparently assured Harbury that the government had "scraped the bottom of the barrel" for information relating to Bamaca but would nonetheless continue to examine the situation and keep her informed. *See id.* ¶ 83. By the time that Harbury and NSA Lake met, however, the NSC possessed a September 1993 Defense Intelligence Agency report verifying that Bamaca has been executed while in custody. *See id.*¶ 84. Harbury claims that between her November 1994 meeting with NSA Lake and February 1995, she met repeatedly with State Department and NSC Defendants, who consistently informed her that no information existed to show that her husband was alive. *See id.* ¶ 86.

While this Court joins the other circuits that have recognized an access-to-courts claim based on a cover-up, it nonetheless must dismiss Harbury's action for two reasons. First, as this cause of action has evolved, courts have required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-of access claim. *See Delew*, 143 F.3d at 1223; *Swekel*, 119 F.3d 1264; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995). Even the circuit that decided *Bell*, the case upon which Harbury states primary reliance, has clarified that because the "cornerstone of our decision in *Bell* was that conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access," no claim would arise unless the plaintiffs "have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up." *Vasquez*, 60 F. 3d at 329. Cognizant that a violation of the right of access depends entirely on the extent to which a plaintiff's state court remedy has been undermined, the Sixth Circuit has concluded: "Before filing an 'access to courts' claim, a plaintiff *must make some attempt to gain access to the courts;* otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel*, 119 F.3d at 1264 (emphasis added); *see also Delew*,

143 F.3d at 1223 ("[B]ecause the Delews' wrongful death action remains pending in state court, it is impossible to determine whether this [denial of right of access] has in fact occurred.") Harbury speculates that "it is likely that key witnesses ... may now be dead or missing, that crucial evidence may have been destroyed, and that memories may have faded." Pl.'s Opp'n at 31. That may all be true, but until Harbury "make[s] some attempt to gain access to courts ... how is this court to assess whether such access was in fact 'effective' and 'meaningful.'" *Swekel*, 119 F.3d at 1264.[2] A plaintiff attempting to bring an access-to-courts claim "cannot merely guess that a state court remedy will be ineffective because of a defendant's actions. Rather the plaintiff must present evidence that the defendant's actions *actually* rendered any available state court remedy ineffective." *Id.*; *accord Delews*, 143 F.3d at 1223; *see also Vasquez*, 60 F.3d at 329 (holding that no cause of action existed for an access-to-court claim despite an actual cover-up to destroy evidence because there was no allegation that the plaintiffs could not pursue a tort action in state court or that the value of that action had been reduced). Harbury's suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess.[3] For this reason, the cause of action would have to be dismissed.[4]

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2 To the extent that *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983), and *Bell* hold to the contrary, the Court declines to follow them. Moreover, more recent decisions from the Sixth, Seventh, and Ninth circuits that require a plaintiff to initiate a state-court action before bringing an access-to-court claim represents the better view.

3 That the statute of limitations may have run does not necessarily indicate that a state-court remedy is inadequate or ineffective. Where a defendant has fraudulently concealed its wrongdoing, the discovery rule or the doctrine of equitable tolling will permit a plaintiff to overcome a statute-of-limitations defense in most jurisdictions.

4 Harbury also claims that the Defendants' actins precluded her from bringing an action pursuant to the Freedom of Information Act, 5 U.S.C. §552. While the Defendants' alleged misrepresentations may have lulled her into

To dismiss on this ground would be to do so without prejudice in order to permit Harbury to re-file the action if, after prosecuting her state-court remedy, it becomes clear that the alleged cover-up did, in fact, prejudice her right of access to the courts.[5] Because the parties may well return to court some day, the Court feels compelled to examine whether the Defendants are entitled to interpose a qualified-immunity defense to Harbury's access-to-courts claim. After examining the allegations n the Complaint, the Court concludes that neither Ambassador McAfee nor NSC Lake would have reasonably understood that what he or she did violated a clearly established right of access.

In each of the cases where a plaintiff started an access-to-courts claim, the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence. *See, e.g. Delew*, 143 F.3d at 1221 (police intentionally did not perform a blood-alcohol test on a suspected drunk driver and intentionally failed to preserve physical evidence of an accident such as skid marks); *Swekel*, 119 F.3d at 1260 (police intentionally refused to perform forensic tests and investigate); *Ryland*, 708 F.2d at 969 (prosecutor who had committed murder canceled a scheduled autopsy and obtained the fraudulent signature of the coroner certifying the cause of death as a suicide); *Bell*, 746 F.2d at 1215 (police officer who

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complacency, the deceit did nothing to prevent her from actually filing a FOIA request. Indeed, Harbury did file a FOIA request in January 1995 amid the Defendants' persistent misrepresentations. She also claims that the Defendants' conduct prevented her from "seek[ing] judicial redress to save Mr. Bamaca's life." Pl.'s Opp'n at 31. What form this lawsuit would assume or whether she could maintain it is an issue that she never addresses. A cover-up to conceal evidence cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset.

5 Of course, if the state-court action were dismissed on a independent ground divorced from the cover-up, *e.g.*, sovereign immunity or failure to state a claim upon which relief can be granted, no access-to-court claim would arise.

had shot and killed plaintiff's decedent planted a knife in the victim's hand, falsely claimed that the victim threatened him, and falsely claimed that he shot in self-defense). No such nefarious conduct is alleged in the Complaint. Ambassador McAfee and NSA Lake each assured Harbury that the government had no information about Bamaca and made allegedly disingenuous overtures to assist her. Similarly, the unnamed State Department and NSC Defendants perpetuated these misrepresentations by continuing to deny any knowledge about Bamaca. Conspicuously absent from the Second Amended Complaint are allegations that Ambassador McAfee, NSA Lake, or any other State Department or NSC Defendants destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate. To be sure, *Bell* colored the right with broad strokes, reasoning that the "constitutional right [of access to the courts] is lost where ... police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress." *Bell*, 746 F.2d at 1261. But *Bell* and its progeny bear important factual differences from this case. Unlike the local crimes that the defendants in other cases covered-up, the State Department and NSC Defendants are alleged to have deceived Harbury about what they knew about the face of – in Harbury's words – "a high-ranking commander of the Guatemalan National Revolutionary Union ("U.R.N.G.") resistance forces." 2nd Am. Compl. ¶ 33, who had been captured during an armed conflict with military forces deployed by a government with whom the United States maintains formal relations. The court cannot hold that Ambassador McAfee, NSA Lake, or the unnamed State Depar[illegible]t and NSC Defendants would have reasonably known that they could not be forthcoming in discussing the intelligence that they received about Bamaca. This is not to say that the Defendants' action, if true, enjoy moral approbation nor is it to diminish the grief and anguish that Harbury must have endured in the months and years following her husband's capture. Liability under *Bivens*, however, depends not on collective outrage or moral

repugnancy but on clearly established constitutional norms that a reasonable official would understand. Ambassador McAfee, NSA Lake and the unnamed State Department and NSC Defendants are entitled, therefore, to qualified immunity from Harbury's access-to-courts claim.

D. *Constitutional Right of Familial Association*

Harbury alleges two methods in which the defendants violated her constitutional right of familial association. First, and most directly, her rights were supposedly violated when Bamaca was killed as a result of the alleged conspiracy. The second method itself has two facets, both based on State Departments/NSC misrepresentations about Bamaca's fate: one, that the lies severed a familial interest; two, that the lies impinged on her right to conduct her family affairs.

1. Whether Bamaca's death violated Harbury's right of familial association

Once again pressing into action the Seventh Circuit's decision in *Bell*, Harbury claims that the CIA Defendants violated her right to familial association under the First and Fifth Amendments when they allegedly conspired to murder Bamaca. *Bell*, several cases from the Ninth Circuit, and a footnote in a Third Circuit opinion – all of which concerned a parent's right to familial association with his or her child – suggest that parents possess an independent constitutional claim when government officials wrongfully end their children's lives. *See Bell*, 746 F.2d at 1244-45; *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986), *Smith v. City of Fontana*, 818 F.2d 1411, 1418 & n.9 (9th Cir. 1987); *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985), *overruled on other grounds, DeShaney v.*

Winnebago County Dep't of Soc. Servs., 489 U.S. 198 (1989).[6] Other circuits, though recognizing that a right of familial association exists, have required evidence that the defendants' actions were aimed directly at the familial relationship; it is not enough in these jurisdictions that a familial relationship ended as an indirect result of unlawful government conduct. *See Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994); *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991); *Harpole v. Arkansas Dep't of Hum. Servs,*, 820 F.2d 923, 927-28 (8th Cir. 1987); *Ortiz v. Burgos*, 807 F.2d 6, 7-9 (1st Cir. 1986); *Trujillo v. Board of County Comm'rs*, 68 F.2d 1186, 1189-90 (10th Cir. 1985); *Reed v. Knox County Dep't of Hum. Servs.*, 968 F. Supp. 1212, 1223-24 (S.D. Ohio 1997); *Divergilio v. Skiba*, 919 F. Supp. 265, 269 (E.D. Mich. 1996). After analyzing these competing conceptions of the right, the Court finds that the rule requiring that the defendants directly targeted the familial relationship best accords with Supreme Court precedent and the principles espoused in the First and Fifth Amendments. Moreover, even were this Court inclined to adopt the *Bell* reasoning, the Defendants would be entitled to qualified immunity under the standard.

Courts that have addressed this issue have divided constitutionally protected interests in familial relationships into two categories. In the first are those that preserve the right to

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6 Harbury cites *Mattis v. Schnarr*, 502 F.2d 588, 593-95 (8th Cir. 1974), for this proposition but the case offers no such support. Whether a father could maintain a § 1983 action against a police officer who shot and killed his son was not at issue before the Eighth Circuit. *See id.* at 590 & n.1 (noting that no appeal was taken from the district court's denial of the father's prayer for damages). Rather, the Court assessed whether a father's interest in familial association permitted him to raise a constitutional challenge for a declaratory judgment against a Missouri statute. Lest there be any doubt about the vitality or authority of *Mattis*, the Eighth Circuit's decision thirteen years later in *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 297-28 (8th Cir. 1987), adopts a decidedly different conception of the right to familial association.

make private decisions affecting the family, such as procreation, *see Griswold v.Connecticut*, 381 U.S. 479 (1965), and whether to school one's children in religious as well as secular matters, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Although Harbury raises claims based on this line of cases elsewhere in her Complaint, *see infra*, the present claim under review is not predicated on stripping her of the capacity to make decisions affecting the family. The second category of protected interests in familial relationships encompasses cases involving "governmental attempts to directly affect the parent-child relationship by means such as determining paternity or terminating parental rights." *Harpole*, 820 F.2d at 927; *accord Ortiz*, 807 F.2d at 8.

Although Harbury's relationship with her husband was forever severed as a result of the Defendants' alleged conspiracy, nothing in her Complaint or briefs suggests that the Defendants wanted Bamaca dead in order to interfere with the relationship that he and Harbury shared. As the First Circuit has noted, "we think it significant that the Supreme Court has protected the parent only when the government *directly* acts to sever or otherwise affect his or her legal relationship with a child." *Ortiz*, 807 F.2d at 8 (emphasis added). Other circuits have emphasized that the Due Process Clause does not "encompass deprivations resulting from government actions affecting the family only incidentally," *Shaw*, 13 F.3d at 805, that "in order to establish a violation of a right to familial associational privacy, the state action must be directly aimed at the parent-child relationship," *Pittsley*, 927 F.2d at 8, and that "[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct." *Harpole*, 820 F.2d at 928. Thus, even when government officials have savagely beaten a family member, many circuits have balked at recognizing an interference-with-familial-relations cause of action for lack of any allegations that

the defendants directly acted to sever the relationship. *See Shaw*, 13 F.3d at 804-05 (rejecting familial-association claim brought by wife and child of individual shot and killed by state trooper); *Harpole*, 820 F.2d at 927-28. Even the Seventh Circuit, which decided *Bell*, has admitted that *Bell* and its progeny "have, it is true, evoked a measure of skepticism in other circuits, especially now that the Supreme Court has held negligent infliction of harm is not actionable under section 1983." *Niehus v. Liberio*, 973 F.2d 526, 553 (7th Cir. 1992) (citing *Daniels v. Williams*,, 474 U.S. 327, 330-31 (1986)). Because Harbury does not claim that the Defendants directly targeted her relationship with Bamaca, she has failed to state a cause of action for interfering with her constitutional right of familial association.

Moreover, even were this Court inclined to follow the lead of *Bell*, the decisions from the First, Fourth, Eighth, and Tenth Circuits to the contrary undermine any claim that the right as conceptualized in *Bell* was clearly established. It is also significant that every case cited by Harbury and all familial-associational rights cases decided by the Supreme Court have concerned the parent-child relationship. These decisions have placed great emphasis on the unique nature of the relationship forged between a parent and his or her child. While the "clearly established" rubric does not mandate that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson* 483 U.S. at 640, the singularly special bond between parent and child sufficiently distinguishes *Bell* and its progeny from the case at bar. Accordingly, this cause of action is dismissed with prejudice.

2. Violation by Misrepresentation

a. Interference with attempts to obtain information about Bamaca

Harbury relies on this Court's opinion in *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983), in which the court held that the government unconstitutionally violated a non-custodial father's due process right when it placed the child in the Witness Protection Program without affording the father a hearing. From this case and one from the Eighth Circuit that reached the same result, *see Ruffalo by Ruffalo v. Civiletti*, 702 F.2d 710, 714 (8th Cir. 1983), Harbury attempts to claim that when the State Department and NSC Defendants lied to her about her husband's fate, they essentially acted like the *Franz* defendants by preventing her from gaining access to Bamaca. There is, however, an obvious difference between affirmatively removing a child from a parent's custody and simply deceiving (no matter how morally abhorrent) someone about the whereabouts of her husband.

Furthermore, Ambassador McAfee, NSA Lake, and the remaining State Department and NSC Defendants would not have reasonably understood their statements about Bamaca to run afoul of the constitutional right set forth in *Franz*. As this Court has already observed in a different context, Bamaca was apprehended during an armed conflict in Guatemala's tumultuous civil war. For the State Department and NSC Defendants to deny that they had any intelligence data concerning Bamaca does not violate any clearly established right under the Constitution. Qualified immunity therefore insulates the State Department and NSC Defendants from liability.

b. Interference with efforts to make family decisions

Harbury's final argument is equally imaginative and similarly vulnerable to a qualified immunity defense. Citing a number of Supreme Court cases that have affirmed the due-process right to be free from unreasonable governmental interferences with the family, Harbury claims that the State Department and NSC defendants violated this right when they lied to her about Bamaca's fate. Under this "right," Harbury "had the right to develop and select a course of action to protect her family members, just as she could have selected their medical care and educational efforts and religious activities. Concomitantly, if her husband was dead, she had a right to know the truth so as to be certain that he was no longer suffering, and to retrieve his remains, offer him proper burial and take any other appropriate actions." Pl.'s Opp'n at 39-40. Precedent, however, does not support the right that Harbury claims, and therefore, the Court concludes that she has failed to state a claim upon which relief may be granted. Moreover, whatever one may say about whether the Constitution's protections should encompass such claims, the right that Harbury prosecutes was by no means clearly established when the defendants allegedly lied to her.

This argument is exactly what the Supreme Court in *Anderson* cautioned against when it held that the rights asserted in *Bivens* actions must be particularized, not generalized claims under broad, somewhat amorphous constitutional provisions. Here Harbury cites a number of cases – none of which remotely touch upon the case at bar – that all share the common denominator that decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty" interest protected by the Due Process Clause. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). As the *Anderson* Court observed, "if the test of 'clearly established

law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow [v. Fitzgerald]*." *Anderson*, 483 U.S. at 639. From this general holding a reasonable official could not have anticipated incurring personal liability under *Bivens* for being less than forthcoming about what the federal government knew about Bamaca.

Moreover, case law seems at least indirectly to undermine Harbury's argument. In *Rust v. Sulllivan*, 500 U.S. 173 (1991), the Supreme Court upheld what became popularly known as the "gag rule." The gag rule was a regulation promulgated by the Department of Health and Human Services that, *inter alia*, prohibited clinics receiving Title X funds from counseling, referring, and advocating abortion as a method of family planning. The petitioners in *Rust* claimed that by "depriving a Title X client of information concerning abortion as a method of family planning, the [gag rule] violate[d] a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of governmental-imposed harm." *Rust*, 500 U.S. at 202. The Court rejected the argument. Although not precisely on point, *Rust* does call into doubt the clarity of the informational right that Harbury claims. Because the right was not clearly established, the defendants should receive qualified immunity.

IV. Tort Liability of the Individual Defendants

The federal Defendants move to dismiss Harbury's tort claims for lack of subject-matter jurisdiction. Construing Harbury's Complaint to arise under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2679, the federal Defendants accurately observe that the only proper defendant in an FTCA action is the United States of America. Because Harbury has failed to sue the United States, her tort claims fail for want of jurisdiction – or so the argument goes.

What the federal Defendants fail to appreciate is that Harbury has not brought an action under the FTCA; she has, instead, simply sued each of the defendants in his or her individual capacities for various common-law torts. *See* 2d. Am. Compl. ¶¶ 10-32 (indicating that defendants are sued in their official *and* individual capacities). To be sure, her claims may very well come to be adjudicated under the aegis of the FTCA if the Attorney General certifies that the defendants were "acting within the scope of [their] office or employment at the time of the incident out of which the claim arise." 28 U.S.C. § 2679(d)(1). But the Attorney General has yet to certify that any of the named defendants were acting within the scope of their employment. If she were to issue such certifications, the United States will automatically be substituted for the individual defendants. *See id.* Thus, Harbury need not amend her Complaint to add the United States as a party-defendant if, in fact, the Attorney General subsequently certifies that the named defendants were acting within the scope of their offices or employment. Accordingly, the Defendants' motion to dismiss Harbury's tort claims is denied with respect to the individuals named in the Second Amended Complaint.[7]

---

7 To the extent Harbury seeks to sue the CIA, the State Department, and the NSC for tort violations this Court lacks subject-matter jurisdiction because none of those agencies has waived sovereign immunity from suit except on the terms set forth in the FTCA. As noted above, the only proper party under the FTCA is the United States.

V. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the federal Defendants' motion to dismiss. A separate Order accompanies this Memorandum Opinion.[8]

March 22, 1999

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

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8 Harbury's Second Amended Complaint contains a single count for violations of international law. All that the Defendants say about this claim is that it is vague because she cites no applicable provisions of international law. Although it is vague, to e sure, the Court refuses to dismiss it on that basis alone. Pursuant to the accompanying Order, Harbury shall file a more definite statement indicating the specific provisions and norms of international law that the Defendants allegedly violated.

APPENDIX C

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion, it is, this 22 day of March, 1999, hereby

ORDERED the Defendants' motion to dismiss [#78] shall be, and hereby is, **GRANTED IN PART** and **DENIED IN PART**; and it is

FURTHER ORDERED that Counts 1-17 of the Seconded Amended Complaint shall be, and hereby are, **DISMISSED WITH PREJUDICE**; and it is

FURTHER ORDERED that in all other respects, the Defendants' motion to dismiss is **DENIED**; and it is

FURTHER ORDERED that by no later than April 5, 1999, the Plaintiff shall file a more definite statement identifying the specific norms and provisions of international law on which she

predicates the international-law claim in her Second Amended Complaint.

SO ORDERED.

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

ORDER AND JUDGMENT

Upon consideration of Defendant's motion for Rule 54(b) certification and the entire record, and it

Appearing that this Court's opinion and order filed March 23, 1999 resolves some but not all of the claims against some but not all of the parties, and it further

Appearing that especially in view of the Supreme Court's admonition in Harlow v. Fitzgerald, 457 U.S. 800 (1982) that suits brought under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) against federal officials in their personal capacities should be resolved promptly, and it further

Appearing that this Court hereby expressly determines that there is no just cause for delay, it is therefore this 8 day of August, 1999, hereby

ORDERED that final judgment is hereby entered in favor of the individual defendants on the Bivens claims against them.

/s/ Colleen Kollar-Kotelly
United States District Judge

APPENDIX E

Jennifer K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez Appellant,
v.
John M. DEUTCH, Director, Central Intelligence Agency (CIA), et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Filed April 6, 2001.

Before: HARRY T. EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

ORDER

PER CURIAM:

Upon consideration of appellees' petition for rehearing filed January 26, 2001, it is

ORDERED that the petition be denied.

The Government claims that the panel opinion "marks a significant and potentially dangerous expansion of the constitutional 'right of access' to the courts," creating an "open-ended constitutional tort for every instance where a government official conceals information, or obstructs a judicial proceeding." Appellees' Petition for Reh'g at 1, 7. This is incorrect. To begin with, as a procedural matter, the opinion will not open the courts to a flood of constitutional access to

courts claims. It endorses the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief. *See Harbury v. Deutch*, 233 F.3d 596, 608-09 (D.C. Cir. 2000). The panel opinion permits Harbury to bring her access to courts claim now only because, if the facts she pleads are correct (this case is here on a motion to dismiss), defendants' actions "completely foreclosed" one of her primary avenues of relief. *Id* at 609. Moreover, as a substantive matter, the opinion distinguishes Harbury's situation from those where a plaintiff, despite a cover-up, has enough information to file a "John Doe" suit. *Id.* at 609-10. It thus expresses no view on the constitutionality of cover-ups that do not "conceal[ ] most of the essential facts" of a cause of action until bringing it would be "futile." *Id.* (internal quotation marks omitted). In addition, and most important, the opinion explicitly and repeatedly limits its holding to situations where--as Harbury alleges – defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit. *See id.* at 608, 610, 611.

The Government also alleges that cover-ups of the type alleged here are sometimes "necessary in order to protect the national security or to maintain the secrecy of classified intelligence sources or methods." Appellees' Petition for Reh'g at 2. Accordingly, the Government argues, the panel opinion threatens to "jeopardize foreign intelligence sources and implicate foreign relations." *Id.* As the opinion expressly points out, however, the Government never claimed, either before the district court or the panel, that the cover-up alleged by Harbury was necessary to maintain national security. *See Harbury*, 233 F.3d at 610. Having not yet filed an answer in this case, the Government is free to assert a national security defense when it does so.

Next, the Government claims that Harbury has failed to "point to a colorable claim that has been prejudiced by the alleged cover-up" and that "the injunctive action which was allegedly thwarted is not even colorable." Appellees' Petition for Reh'g at 9, 14. But Harbury specifically claimed in her complaint that the alleged cover-up "foreclosed [her] from effectively seeking adequate legal redress." *See* Complaint ¶ 98, cited in *Harbury*, 233 F.3d at 609. Such a "short and plain statement of the claim," Fed.R.Civ.P. 8(a)(2), providing sufficient information to allow a party to "frame a responsive pleading," Fed.R.Civ.P. 12(e), is all the federal rules require. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085-86 (D.C. Cir. 1998). Moreover, on appeal – and without response from the Government – Harbury amplified this claim, explaining in her brief that if she had "learned of her husband's situation while he was still alive, she would have immediately initiated court proceeding[s] seeking emergency injunctive relief." Appellant's Opening Brief at 35. At oral argument, her counsel further explained that such an injunction could have been based on an underlying claim for intentional infliction of emotional distress. *Harbury*, 233 F.3d at 609. On a motion to dismiss, "the factual allegations of the complaint must be taken as true, and *any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Here, Harbury's proposed action for injunctive relief to save her husband's life is on its face colorable. *See Harbury v. Deutch*, No. 96- 00438 at 27-28 (D.D.C. Mar. 23, 1999) (denying the Government's motion to dismiss Harbury's tort claims). On remand, it is certainly open to the Government to argue – if the record as it is developed so allows – that Harbury's hypothetical injunctive action would have been so unlikely to succeed that she cannot plausibly claim that defendants' alleged cover-up was a "substantial cause of [her] failure to obtain judicial relief." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 n. 72 (7th Cir. 1984).

Our dissenting colleagues suggest that "[n]o United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national." *Harbury v. Deutch*, No. 99-5307, slip op. dissent at 1 (Henderson, J., dissenting from denial of rehearing en banc). But as the intentional infliction of emotional distress claims Harbury also pleaded in her complaint demonstrate, *see Harbury*, 233 F.3d at 600, the alleged tortfeasors here were domestic: the government officials who allegedly conspired with, collaborated with, directed, and paid Bamaca's torturers. *See* Complaint at ¶ 200 ("The CIA Defendants' collaborating and/or conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca constituted extreme and outrageous conduct."). Harbury's complaint also suggests that in her action for intentional infliction of emotional distress, she could have alleged injury not just to Bamaca, but also to herself; in other words, Harbury, a United States citizen, could have sought relief in a United States court on her own behalf against United States government officials. *See* Complaint at ¶ 201 ("This extreme and outrageous conduct was engaged in intentionally or recklessly and caused both Mr. Bamaca and Plaintiff to endure severe physical and emotional distress."). As Harbury explains in her response to the Government's petition, an injunctive action against these officials might have saved Bamaca's life by enjoining them from "directing, conspiring in, and paying for the continued secret detention and torture of her husband, and direct[ing] [them] to require the assets on the payroll to stop engaging in such behavior." Appellant's Response to Petition for Reh'g at 9. As we stated earlier, the Government is free to argue on remand that, either because of the nature (or absence) of the relationship between Bamaca's torturers and the CIA defendants, or for some other reason, the chances of this happening were too remote to justify awarding Harbury relief.

The Government next suggests that it is unclear "what legal liability the State Department and NSC officials were attempting to avoid," since "[Harbury's] state law tort claims regarding the torture of her husband are all directed at the CIA defendants." Appellees' Petition for Reh'g at 11. But access to courts claims are not restricted to cases in which officials are alleged to have covered up their own illegal actions, and the Government itself acknowledges that two of the cases it cites, *Bell*, 746 F.2d at 1256-58, and *Ryland v. Shapiro*, 708 F.2d 967, 969 (5th Cir. 1983), involve cover- ups of "coworkers' wrongdoing." *See* Appellees' Petition at 7. Here, Harbury alleges that all three defendant agencies worked together to conceal Bamaca's capture and torture in order to obtain the maximum amount of information from him. *See* Complaint at ¶ 167 ("[State and NSC defendants] have a long-standing policy, pattern or practice of providing false information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information."); *id.* at ¶ 67, *quoted in Harbury*, 233 F.3d at 600 ("[State and NSC defendants] intentionally misled [Harbury] . . . because they did not want to threaten their ability to obtain information from Mr. Bamaca."). Moreover, after their initial cover-up of Bamaca's capture, State and NSC defendants themselves might have been subject to direct tort liability for their alleged concealment and misrepresentation. *See* Complaint at ¶¶ 217-37 (stating tort claims against these defendants for intentional infliction of emotional distress, intentional misrepresentation, negligent misrepresentation, and constructive fraud). In allegedly deceiving Harbury, they thus might have been attempting to avoid their own legal liability as well.

As to Harbury's allegations of defendants' intent, although the Government is correct that under *Crawford-El v.*

Britton, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), a district court can require a plaintiff to support her complaint with "specific, nonconclusory factual allegations," Appellees' Petition for Reh'g at 11, the district court here did this only with respect to Harbury's conspiracy allegations against the CIA defendants – not with respect to Harbury's access to courts claim. *Harbury v. Deutch*, No. 96-00438 at 5 (D.D.C. July 20, 1998) (order requiring plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive" of CIA defendants). Moreover, Harbury expressly alleged that "internal [State and NSC] memoranda" reveal the defendants' intent to mislead Harbury. *Harbury*, 233 F.3d at 600.

Finally, with respect to the Government's qualified immunity arguments, neither the fact that defendants did not "fabricat[e] evidence," Appellees' Petition for Reh'g at 14, nor the fact that the alleged torture occurred outside the United States is enough to entitle the defendants to qualified immunity. Under *Anderson v. Creighton*, the "very action in question" need not have been previously held unlawful; rather, the law need only allow officials "'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). Here, defendants allegedly acted affirmatively to mislead Harbury and did so with a specific intent to deny her access to a federal court. Under existing caselaw, such action was clearly unconstitutional. *See Dele v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (following the Sixth Circuit and stating that "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively cover[ ]-up evidence and actually render[ ] any state court remedies ineffective"); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("if a party engages in actions

that effectively cover-up evidence ... they have violated his right of access to the courts"); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[E]fforts by state actors to impede an individual's access to courts . . . may provide the basis for a constitutional claim under 42 U.S.C. § 1983."); *Crowder v. Sinyard*, 884 F.2d 804, 812 (5th Cir. 1989) ("[I]f state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation."); *Ryland*, 708 F.2d at 973 (constitutional right of access violated where "agents of the state intentionally engaged in conduct that interfered with [the] exercise of [the] constitutionally protected right to institute a wrongful death suit"); *cf. Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("[G]overnment officials," though "not under any duty to volunteer to [plaintiff] information that would alert it to the existence of a claim against the federal government and certain of its officials for . . . wrongful death," "[o]n the other hand . . . were not free to arbitrarily interfere with [plaintiff's] vindication of its claims. Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

In arguing that defendants are entitled to qualified immunity, our dissenting colleagues again rely on the notion that the tortfeasors here are foreign nationals: they suggest that reasonable officials could have thought it constitutional to cover up Bamaca's "captivity by foreign nationals on foreign soil in order to keep [Harbury] from obtaining relief in a United States court that would prevent her husband's subsequent murder on foreign soil at the hands of the foreign nationals." *Harbury*, No. 99-5307, slip op. dissent at 2. But again, Harbury does not

allege that defendants violated her right of access to courts by covering up the actions of foreign nationals unassociated with the United States government. Rather, she alleges that defendants are liable for misleading her about the involvement of United States government officials who allegedly "engaged in, directed, collaborated and conspired in, and otherwise contributed to" Bamaca's torture and murder. *See* Complaint at ¶ 49, *quoted in Harbury*, 233 F.3d at 599. Similarly, the legal liability defendants allegedly intended to avoid was not the liability of Guatemalan nationals unassociated with the United States government, but rather the liability of fellow United States Government officials for their involvement in Bamaca's torture.

APPENDIX F

Jennifer K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, Appellant,

v.

John M. DEUTCH, Director, Central Intelligence Agency (CIA), et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Filed April 6, 2001.

Before: EDWARDS, Chief Judge; STEPHEN F. WILLIAMS, GINSBURG, SENTELLE, KAREN LeCRAFT HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges.

A statement of Circuit Judge HENDERSON dissenting from the denial of rehearing en banc, joined by Circuit Judge SENTELLE, is attached.

Circuit Judge GARLAND did not participate in this matter.

ORDER

PER CURIAM:

Appellees' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

KAREN LeCRAFT HENDERSON, Circuit Judge, with whom SENTELLE, Circuit Judge, joins, dissenting:

I dissent from the denial of rehearing en banc because Harbury suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor. As the panel opinion notes, to state a claim Harbury must allege that the defendants' misrepresentations and nondisclosures foreclosed her "'from effectively seeking adequate legal redress,'" *Harbury v. Deutch*, 233 F.3d 596, 609 (D.C. Cir. 2000) (quoting Complaint ¶ 98). Yet Harbury has nowhere identified what "legal redress" might have been adequate to save her husband. Her claim on appeal that but for the government's deception she "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress," *id.*, does not fill the bill. No United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national. While Harbury may not be required to plead "a strict causal showing of exactly what relief [she] would have obtained in court had defendants not concealed the truth," she must nevertheless "establish that the concealment was a substantial cause of [her] failure to obtain judicial relief." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 n. 72 (7th Cir. 1984). She has not. The only cause is the absence of any effective relief. "I do not believe the Court does a [party] a favor by giving it an opportunity to expend resources in litigation that has no chance of success." *South Carolina v. Regan*, 465 U.S. 367, 403, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984) (Stevens, J., dissenting).

Even had Harbury made a colorable claim, the individual government defendants would be entitled to qualified immunity because reasonable officials in their positions could have

believed that under established law their actions did not violate Harbury's constitutional right of access to the courts. In cases from other circuits finding such a right was violated, the plaintiffs alleged that the defendant state officials, police officers or prosecutors, covered up murders by other such officials in order to prevent the plaintiffs from pursuing wrongful death actions. *See, e.g., Bell, supra*; *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). In this case, by contrast, Harbury contends the National Security Council and the State Department covered up her husband's captivity by foreign nationals on foreign soil in order to keep her from obtaining relief in a United States court that would prevent her husband's subsequent murder on foreign soil at the hands of the foreign nationals. The defendants plainly were not on notice that such very different conduct might violate Harbury's right of access to the courts. *See Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001) ("A constitutional right was 'clearly established' at the time of the events in question only if '[t]he contours of the right [were] sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (citing *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C. Cir. 1991); *Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C. Cir. 1987)).

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 28, 2001

Hon. Theodore R. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: John M. Deutch, et al. v. Jennifer K. Harbury
Application No. 00A1139

Dear Mr. Olson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on June 28, 2001, extended the time to and including August 6, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By /s/ Melissa A. Blalock

Melissa A. Blalock
Assistant Clerk

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 28, 2001

Hon. Theodore R. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: John M. Deutch, et al. v. Jennifer K. Harbury
Application No. 00A1139

Dear Mr. Olson:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on July 31, 2001, extended the time to and including September 3, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By /s/ Melissa A. Blalock

Melissa A. Blalock
Assistant Clerk